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STUDIES IN HISTORY AND JURISPRUDENCE

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IX

OBEDIENCE

The question which meets on the threshold of their inquiries all who have speculated on the nature of political society and the foundations of law is this: What is the force that brings and keeps men under governments? or, in other words, What is the ground of Obedience?

I. Theories regarding Political Obedience.

The answers given by philosophers to this question, while varying in form, group themselves under two main heads. Some assign Fear as the ground, some Reason. One school discovers the power that binds men together as members of a State in Physical Force, acting upon them through the dread of death or other physical evil. The other conceives it to lie in a rational view of the common advantage, which induces men to consent of their own free will to forgo some measure of their (supposed) original personal independence in order to obtain certain common benefits. Thus, while the former school finds the origin of law in Compulsion, the latter finds it in Agreement.

Both schools are of high antiquity, and have been represented by many eminent names. One gathers from Plato that divers sophists maintained the former thesis. It is in substance not far from that assigned to Thrasymachus in the *Republic*, where the Sophist says that Justice is nothing but the advantage of the stronger; and

in later times Hobbes and Bentham are eminent among those who embrace it. The other view is most familiar to moderns from the writings of Rousseau; but it has a long and interesting history, intertwined with that of the notions of the State of Nature and the Law of Nature, and also with the history of the conception of Sovereignty—topics which are discussed elsewhere in this volume. Rousseau grounds obedience on the original 'social contract,' whereby each and every person agrees with every other to forgo his natural freedom by constituting a State which is to act for all, and in which the citizen recovers his freedom because he is himself a part of that 'general will' to which he renders a reasonable service. The Aristotelian doctrine that men are by their very constitution sociable creatures, naturally drawn to create and to live in communities, comes nearer to the second view, while escaping by its generality of expression the errors into which those who set political society upon the foundation of contract have frequently been betrayed. And it need not be added that many other philosophers in comparatively modern times, basing the State, some of them on the nature of man, some on eternal reason or the will of God, have held that it thereby acquires an absolute right to obedience from its members. These speculations, however, seldom touch the particular point I propose to discuss here, viz. the grounds which actually dispose men to obedience.

Of the two chief older theories, that which represents men as led by reason to enter into a Contract has of late fallen into discredit, being indeed so evidently opposed to what we know of the early state

of mankind that it may be doubted whether most of those who propounded or have adopted it did not mean it to be taken rather as an apologue or mythical presentment of moral facts than as a piece of history. The theory of Force and Fear, on the other hand, has retained much of its vogue, having connected itself with a system of jurisprudential terminology which is, or lately was, influential in England and not unknown in America. According to Bentham and his followers, there is in every State a Sovereign who enjoys unlimited physical, and therefore also unlimited legal, power. His might makes his right. He rests on Force and rules by Fear. He has the sole right of issuing Commands. His Commands are Laws. They are enforced by Threats, and are obeyed in respect of the apprehension of physical harm to follow on disobedience. Whether those who adhere to this body of doctrine think it historically true as an account of the origin of law, or merely adopt it as a concise explanation and summary view of the principles on which modern law and highly developed forms of political society are based, is not always clear from the language they use. But the importance they attach to Force appears not only from the contempt they pour on the contractual theory of government, but also from their omission to refer to any facts in the character and habits of mankind except those which are connected with Force and Fear as factors in the development of the social organism.

A little reflection will, however, convince any one who comes to the question with an open mind that both these theories, that of compulsion as well as that

of contract, are alike incomplete, and, because incomplete, are misleading. They err, as all systems are apt to err, not by pointing to a wholly false cause, but by extending the efficiency of a true cause far beyond its real scope. Rousseau is right in thinking that political society needs a moral justification, and that the principle of individual freedom is best satisfied where every one obtains a share in the government to which he submits. The Contractualists generally may find a solid basis for authority in the fact that organized society does actually render to each of its members some return for the so-called 'natural liberty' which he has surrendered. Even a bad government gives him at least a measure of protection, however imperfect, for his person and property against the attacks of any one but the government itself. Here there is, if not what we can call an implied contract, at least a consideration, a sort of mutuality of service in the political relation, for which each member gives something, and from which each gains something. To go further, and either to explain the growth of government by a conscious bargain at some past moment, or to conceive the idea of such a bargain as present to the bulk of those who live in any actual society now, or to regard the individual members of society as entitled to act upon contractual principles towards their government and one another, is to plunge at once into what are not more palpably historical errors than unworkable principles. So also the school of Thrasymachus and that which claims Hobbes as its founder are right in feeling that some test must be found of the solidity of a community and

the actual working strength of its machinery; and they discover this in the fact that physical force is the *ultima ratio* wherewith to coerce the disturbers of the community and the transgressors of the law. Without force in the background, the law might be defied. It is when the men of this school, or some of them, go on to represent physical compulsion as the means by which communities have been in fact formed—though, to be sure, Hobbes himself alleges a contract as the very first step [1]—and Fear as the motive which in fact secures respect to the law from the majority of the citizens, that they depart alike from history and from common sense. The problem of political cohesion and obedience is not so simple as either school of theorists would represent it.

To show that both schools are historically wrong would not be difficult. This has been often done as against such of the Contractualists as have held that conscious reason brought men out of the State of Nature by a compact; and if the historians who deal with the earlier stages of human progress have not cared to demolish the Physical Force doctrine, this may have happened because none has thought it worth while to refute a theory whose flimsiness they have perceived, but which they have deemed to lie outside the sphere of history. As it is the historian who best understands how much Force has done to build up States, so he most fully sees that Force is only one among many factors, and not the most important, in creating, moulding, expanding and knitting

[1] See as to the doctrine of Hobbes, the Essay on Sovereignty which follows this Essay.

together political communities. It is not, however, necessary to institute any historical inquiry in order to reach this conclusion. An easier course is to interrogate one's own consciousness, and to observe one's fellow men. The problem of obedience to government and law is part of the larger and even more obvious problem of the grounds of Obedience in general. Why do we all forgo the gratification of many of our personal desires, desires in themselves harmless, merely because they are not shared by others? Why do we go on echoing opinions whose soundness we more than doubt? Why do we pursue pleasures which give us no amusement, but rather weariness? Why do we adhere to a party, political or ecclesiastical, of whose conduct we often disapprove? Why in fact is so large a part of our daily conduct determined, not by our own natural preferences, but by compliance with the opinion of others or submission to the social conditions that surround us?

II. The Grounds of Obedience in General.

Political obedience is not a thing by itself, but a form of what may be called Compliance in general.

The grounds or motives of Compliance can be summed up under five heads. Putting them in the order of what seems to be their relative importance, they may be described as the following—Indolence, Deference, Sympathy, Fear, Reason. Let us consider each separately.

By Indolence I mean the disposition of a man to let some one else do for him what it would give him trouble to do for himself. There are of course certain

persons to whom exertion, mental as well as physical, is pleasurable, and who delight in the effort of thinking out a problem and making a decision for themselves. There are also moments in the lives of most of us when under the influence of some temporary excitement we feel equal to a long succession of such efforts. But these are exceptional persons and rare moments. To the vast majority of mankind nothing is more agreeable than to escape the need for mental exertion, or, speaking more precisely, to choose only those forms of exertion which are directly accompanied by conscious pleasure and involve little fatigue. In a great many exertions of thought resulting in determinations of the will there is no pleasure, or at any rate no conscious pleasure, or at any rate no pleasure which is not outweighed by an accompanying annoyance. Such exertions may relate to things in which we have slight personal interest, and therefore no desires to gratify, or to things in which our personal interest is so doubtful that we shrink from the trouble of ascertaining which way it lies, and are glad to shift the responsibility from ourselves to whoever will undertake it for us. The ascendency of one of a married couple, for instance, or of one member of a group of persons living together, is usually acquired in some such way. It is not necessarily the will really strongest that in these cases prevails, but the will which is most active, most ready to take a little trouble, to exert itself on trivial occasions and undertake small responsibilities. Persons of a resolute and tenacious character are sometimes also hesitating and undecided, because they cannot be at the trouble of setting to

work, for the little questions of daily life, their whole machinery of deliberation and volition. In five persons out of six the instinct to say Yes is stronger than the instinct to say No—were it not so, there would be fewer marriages—and this is specially so when the person who claims consent possesses exceptional force and self-confidence. In other words, most of us hate trouble and like to choose the line of least resistance. In tropical Africa the country is covered by a network of narrow footpaths, made by the natives. These paths seldom run straight, and their flexuosities witness to small obstacles, here a stone and there a shrub, which the feet of those who first marked them avoided. To-day one may perceive no obstacle. The prairie which the path crosses may be smooth and open, yet every traveller follows the windings, because it is less trouble to keep one's feet in the path already marked than it is to take a more direct route for one's self. The latter process requires thought and attention; the former does not.

Nor is the compliance of indolence less evident in thought than in action. To most people, nothing is more troublesome than the effort of thinking. They are pleased to be saved the effort. They willingly accept what is given them because they have nothing to do further than to receive it. They take opinions presented to them, and assume rules or institutions which they are told to admire to be right and necessary, because it is easier to do this than to form an independent judgement. The man who delivers opinions to others may be inferior to us in physical strength, or in age, or in knowledge, or in rank. We may think

ourselves quite as wise as he is. But he is clear and positive, we are lazy or wavering; and therefore we follow him.

Under the name of Deference it is convenient to include the various cases in which some emotion, drawing one person to another, disposes the former to comply with the will of the latter. Whether the emotion be love, or reverence, or esteem, or admiration, a persuasion of superior goodness or of superior wisdom, there is a feeling on the part of the person attracted which makes him ready to sacrifice his own impulses, if they be not of unusual strength, to the will of the person loved or reverenced or admired. Wisdom and goodness give their possessor a legitimate authority, wisdom in making him appear as a fit person to follow where the question is of choosing means, goodness where it is a question of the choice of ends; and the belief that these qualities exist in the person revered or esteemed is just as effective as the reality, such belief being obviously the result of many causes besides a rational scrutiny. The force of the feeling of deference in securing compliance or adhesion varies in different nations and in different states of society. The advantages, for instance, which rank, wealth and learning give to a candidate for any public post in a modern country like France or England, only faintly represent the authority which belonged to birth, learning and sanctity, whether real or supposed, in simpler times. A so-called holy man in the Musulman or Hindu East, a Fakir or a Guru, exerts to-day enormous power in his own neighbourhood, in respect far less of any fear of the harm he can do than simply of the

veneration he inspires. Even if he does not claim a direct supernatural mission, his words carry great weight. And there is abundant evidence in the careers of famous Europeans in the East to show how readily in primitive times a remarkable character and career would permanently attach a halo, not only of admiration but of submissive deference, to the descendants of such a person or to the occupant of the office he had filled.

By Sympathy as a ground of obedience I mean not merely the emotion evoked by the sight of a corresponding emotion in another, but the various forms of what may be called the associative tendency in mankind, the disposition to join in doing what one sees others doing, or in feeling as others feel. The root of this instinct lies very near Indolence; for no way of saving effort is so obvious as to do what others have done or are doing; but it is not quite the same thing as Indolence, for it is a tendency strong among some of the less indolent races of mankind, and each of us must have noted from his own personal experience that its action depends as much upon the susceptibility of the imagination as upon the slowness or slackness of the will. There is hardly a more potent factor than this in the formation of communities, whether social or political, because it unites with, if it be not almost identical with, what we call party and civic spirit, substituting a sense of and a pleasure in the exercise of the collective will for the pleasure of exerting the individual will, and thus tending to subordinate the latter, and to make it rejoice in following, perhaps blindly, the will which directs the common action. The shock to individual pride is

avoided, because each man acts spontaneously, at the bidding of his own emotion, and each feels that what he may lose as an individual he recovers as a member of the body, and that with a better chance of indulging his passions at the expense of his antagonists. The spirit of the body seems to live in and inspire him, increasing indefinitely the force of his own personality. Obedience to the directing authority is here a first necessity, and becomes the more implicit the greater the dangers of whatever enterprise the body may undertake. As fighting covers great part of the life of primitive communities, the disposition to obey becomes early strong among them, because in nothing is obedience so essential as in war.

Perhaps these three sources of the tendency to comply are really only forms of, as they are certainly all closely connected with, the disposition to imitate which is so strong, not only in man, but throughout the animal kingdom, so far as we can observe it. When ninety-nine sheep one after another jump over a fence at precisely the point where the first of the flock has jumped it, they reveal a propensity similar to that which makes a file of savages travelling over a wilderness each tread in the footsteps of his predecessor, or that which soon stamps the local accent upon the tongue of a child brought from some other part of the country, where the mode of speech was different. There is evidently a psychological, doubtless indeed a physiological, cause for this general and powerful tendency to reproduce the acts and ways of other creatures, even where, as in the case of a local accent, there is no motive whatever for doing so. Conscious imitation

is of course frequently explainable by the desire to please, or by a perception of the advantage of doing as others do. But there are many facts to show that its roots lie deeper and that it is due largely to a sympathy between the organs of perception and those of volition, which goes on in unconscious or subconscious states of the mind, and which makes the following of others, the reproduction of their acts, or the adoption of their ideas, to be the path of least resistance, which is therefore usually followed by weaker natures, and frequently even by strong ones.

Of Fear and of Reason nothing need be said, because the school of Hobbes and Bentham for the one, and the apostles of democratic theory for the other, have said more than all that is needed to show the part they respectively play in political society. Fear is no doubt the promptest and most effective means of restraining the turbulent or criminal elements in society; and is of course the last and necessary expedient when authority either legally established or actually dominant is threatened by insurrection. Reason operates, and operates with increasing force as civilization advances, upon the superior minds, leading them to forgo the assertion of their own wills even where such assertion would be in itself innocent or beneficial, merely because the authority which rules in the community has otherwise directed. Reason teaches the value of order, reminding us that without order there can be little progress, and preaches patience, holding out a prospect that evils will be amended by the general tendency for truth to prevail. Reason suggests that it is often better that the law should be certain than

that it should be just, that an existing authority should be supported ather than that strife should be caused by the attempt to set up a better one. So also Reason disposes minorities to acquiesce even where a majority is tyrannical, in the faith that tyranny will provoke a reaction and be overthrown by peaceable discussion.

Allowing for the efficacy of Fear as a motive acting powerfully upon the ruder and more brutish natures, and for that of Reason as guiding the more thoughtful and gentle ones, and admitting that neither can be dispensed with in any community, their respective parts would nevertheless seem to be less important than are the parts played by the three first-mentioned motives. If it were possible either in the affairs of the State, or in the private relations of life, to enumerate the number of instances in which one man obeys another, we should find the cases in which either the motive of Fear or the motive of Reason was directly and consciously present to be comparatively few, and their whole collective product in the aggregate of human compliance comparatively small. If one may so express it, in the sum total of obedience the percentage due to Fear and to Reason respectively is much less than that due to Indolence, and less also than that due to Deference or to Sympathy.

In a large proportion of the cases arising in private life the motive of Fear cannot be invoked at all, because there is no power of inflicting harm; and Reason just as little, because the persons who habitually apply ratiocinative processes to their actions are after all few. It may be said that conscious thought is not ordinarily

applied to action because Habit supplies its place, and Habit, enabling and disposing us to do without consideration the acts which otherwise would need to be considered, is in fact fossil reason. That is largely so, but Habit is still more often the permanent and unchanging expression of Indolence. Nothing becomes a habit so quickly as does the acquiescence due to Indolence, nor does any tendency strike its roots so deep. And though it is true as regards public or civic matters that physical force is always at hand in the background, we must also recognize that the background is not in fact usually visible to the majority of those who act according to the laws which they obey. They do not necessarily, nor even generally, think of the penalties of the law. They defer to it from respect and because other people defer; they are glad that it is there to save them and other people from trouble. This attitude is not confined to civilized States, but has existed always, even in unsettled societies, where the law might not be able to prevail but for the aid of private citizens.

Of the three springs of Obedience which have been represented as on the whole the stronger, Indolence disguises itself under Deference and Deference is intensified by Sympathy; that is to say, the tendency of men to let others take decisions for them which they might take for themselves becomes much stronger and more constant when they have any ground for believing others to possess some sort of superiority, while the disposition to admit superiority is incomparably more active where a number of other persons are perceived to be also admitting it. A society like that in which

modern men live in England or America is apt to suppose that the admission of superiority mortifies a man's pride, but this is so far from being generally true that the attitude of submission is to most men rather pleasurable than the reverse. So Protestants have been apt to assume that the natural and normal attitude of man in religious matters is independence—a wish to seek out truth for himself, a sense of the duty of consulting his own conscience; whereas the opposite is the fact, and those religious systems take the greatest hold upon man which leave least to individual choice and inculcate, not merely humility towards the Unseen Powers, but the duty of implicitly accepting definite traditions or of revering and following visible ecclesiastical guides.

Some philosophers have talked of Will as the distinctive note of Man—and in so far as the exercise of Will implies the conscious exertion of rational choice it may be admitted to be characteristic of him alone. But in mere tenacity of purpose and persistence in a particular course other animals run him hard. A rogue elephant or a bucking mustang can show as much persistence, sometimes mingled with a craft which seeks to throw the opponent off his guard, and bides its time till the most favourable moment for resistance arrives. In most men the want of individual Will—that is to say, the proneness to comply with or follow the will of another—is the specially conspicuous phenomenon. It is for this reason that a single strenuous and unwearying will sometimes becomes so tremendous a power. There are in the world comparatively few such wills, and when one appears, united to high intellectual gifts, it prevails whichever way it turns, because the weaker bow to it and

gather round it for shelter, and, in rallying to it, increase its propulsive or destructive power. It becomes almost a hypnotizing force. One perceives this most strikingly among the weaker races of the world. They are not necessarily the less intelligent races. In India, for instance, an average European finds many Hindus fully his equals in intelligence, in subtlety, and in power of speech; but he feels his own volitions and his whole personality to be so much stronger than that of the great bulk of the native population (excluding a very few races) that men seem to him no more than stalks of corn whom he can break through and tread down in his onward march. This is how India was conquered and is now held by the English. Superior arms, superior discipline, stronger physique, are all secondary causes. There are other races far less cultivated, far less subtle and ingenious, than the Hindus, with whom Europeans have found it harder to deal, because the tenacity of purpose and the pride of the individual were greater. This is the case with the North-American Indians, who fought so fiercely for their lands that it has been estimated that in the long conflict they maintained they have probably killed more white men than they have lost at the hands of the whites. Yet they were far inferior in weapons and in military skill; and they had no religious motives to stimulate their valour.

No one can read the history of the East without being struck by the extraordinary triumphs which a single energetic will has frequently achieved there. A military adventurer, or the chief of a petty tribe, suddenly rises to greatness, becomes the head of an army which attacks

all its neighbours, and pursues a career of unbroken conquest till he has founded a mighty empire. Perhaps he raises vast revenues, constructs magnificent works, establishes justice, creates a system of administration which secures order and peace during his lifetime. Men like Thothmes III, Cyrus, and Darius son of Hystaspes, Khosroes Anushirwan, Saladin, Tamerlane, Baber, Akbar the Great, Hyder Ali are in their several ways only the most striking instances of the tremendous effect which a man of exceptional force and activity produces among Oriental peoples [1]. One asks why this happens chiefly in the East. Is there a greater difference in Asiatic than in European peoples between the few most highly-gifted men and the great mass of humanity, so that where the ordinary characters are weak one strong character prevails swiftly and easily? Or is the cause rather to be sought in the fact that in the East there are no permanent institutions of government to be overthrown? That which is strong and permanent there—viz. the customs, religious and legal, of the people—a ruler does not (except in a fit of insanity) venture to touch, while the thrones of neighbouring potentates go down at a stroke before him. In mediaeval and modern Europe, the weakness of the ordinary man was and is entrenched behind a fabric of government and law, which the strongest individual will cannot overthrow; and it is only when this fabric has been shattered by a revolution, as happened in France at the end of the eighteenth century,

[1] Some of these succeeded to thrones already established, but their careers illustrate none the less the results effected by brilliant gifts appearing in the midst of a comparatively inert people.

that the adventurer of genius and volition has a chance of rivalling the heroes of the East.

Thus the comparative stability of governments in mediaeval and modern Europe does not disprove the view which finds in the force of individual will, and the tendency of average men to yield to it, a potent factor in compelling obedience. For in the European countries the resistance offered to the ambition of such a will is effective, not so much because ordinary men are themselves more independent and more capable of opposition as because their superior intelligence has built up well-compacted systems of polity to which obedience has by long habit become attached. Traditions of deference and loyalty have grown up around these systems, so that they enable individuals to stand firmly together, and constitute a solid bulwark against any personality less forceful than that of a Julius Caesar or a Buonaparte.

To this explanation one may perhaps add another. In the East the monarch is as a rule raised so far above his subjects that they are all practically on a level, as compared with him; and those who are for the moment powerful are powerful in virtue of his favour, which has elevated and may at any moment abase them. This has long been the case in Musulman States, and was to a large extent true even in the Byzantine Empire. It is in some degree true in Russia now. Where there is no land-holding or clan-leading aristocracy, nor any richly endowed hierarchy, there may be nothing to diminish the impression of overwhelming power which the sovereign's position produces. Hence there may be no order of men to set the example of an inde-

pendence of feeling and attitude which springs from their position as the leaders of their dependents and as entitled to be consulted by the Crown. Such an order of men existed in the feudal aristocracy of the Middle Ages, who have done much to create a type of character in the States of modern Europe. To them has now succeeded, in some modern countries, a so-called aristocracy of wealth, which, vain as it may be of its opportunities for influencing others, is much less stable than was the land-holding class of old days, and much less high-spirited. Meanwhile the general levelling down and up which has created what we call modern democracy has, in reducing the number of those whom rank and tradition had made 'natural leaders,' increased the opportunities of strong-willed and unscrupulous men, restless and reckless, versed in popular arts, and adroitly using that most powerful of all agents for propagating uniformity of opinion which we call the newspaper press, powerful because it drives the individual to believe that if he differs from the mass he must be wrong. Such a man may have a career in a huge democracy which he could not have had a century ago, because the forces that resist are fewer and feebler to-day than they were then, and the multitude is more easily fascinated by audacity or force of will, apart from moral excellence, apart from intellectual distinction, than is an aristocratic society.

It may help to explain the theory I am trying to present if we pause for a moment to examine the influences under which the habit of obedience is first formed in the individual man and in the nascent community. For the individual, it begins in the Family;

and it grows up there only to a small extent by the action of Force and Fear. The average child, even in the days of a discipline harsher than that which now obtains, did not as a rule act under coercion, but began from the dawn of consciousness to comply with the wish of the parent or the nurse, partly from the sense of dependence, partly from affection, partly because it saw that other children did the like. Force might sometimes be resorted to; but force was in most cases a secondary and subsidiary agency. Nor did force succeed so well as softer methods. Everybody knows that the children who have been most often punished are not the most obedient, nor is this merely because, being naturally self-willed, they have needed more correction. After those little squalls of aimless passion which belong to a certain period in the child's life have passed away, the boy usually moves as a matter of course at his parents' bidding until the age is reached when circumstances oblige him to act for himself, or when the sense of independence is stimulated by perceiving that others of his own age will despise him if he remains too submissive. The child whose constant impulse is to disobey is as likely to turn out ineffective as the child who obeys too readily; for perversity is as frequently due to want of affection, sympathy, and common sense as to exceptional force of will.

Thus most people enter adult life having already formed the habit of obeying in many things where Force and Fear do not come in at all, but in which the most obvious motive is the readiness to be relieved of trouble and responsibility by following the directions of some one else, presumably superior. They have

also formed during boyhood the habit of adopting the opinions of those around them. An acute observer has said that the chief fault of the English public school is that it makes this habit far too strong. Custom—that is to say, whatever is established and obeyed—has great power over them. No conservatism surpasses that of the schoolboy.

It would not be safe to try to find a general explanation of the growth of political communities in the phenomena of domestic life, though it was a favourite doctrine of a past generation that the germ or the type of the State was to be found in the Family. There are some races among whom the Family and its organization seem to have played no great part. But it is clear that in primitive societies three forces, other than Fear, have been extremely powerful—the reverence for ancient lineage, the instinctive deference to any person of marked gifts (with the disposition to deem those gifts supernatural), and the associative tendency which unites the members of a group or tribe so closely together that the practice of joint action supersedes individual choice. These forces have imprinted the habit of obedience so deeply upon early communities that it became a tradition, moulding the minds of succeeding generations. Physical force had plenty of scope in the strife of clans or cities, or (somewhat later) of factions, with one another; but in building up the clan or the city it was hardly needed, for motives more uniform and steady in their efficiency were at work. To pursue this topic would lead us into a field too wide for this occasion; yet it is well to note two facts which stand out in the early history of those

communities in which Force and Fear might seem to have had most to do with the formation of governments, and of the habit of obedience to authority. One is the passionate and persistent attachment to a particular reigning family, apart from their personal gifts, apart from their power to serve the community or to terrify it. The Franks in Gaul during the seventh and eighth centuries were as fierce and turbulent a race as the world has ever seen. Their history is a long record of incessant and ferocious strife. From the beginning of the seventh century the Merwing kings, descendants of Clovis, became, with scarcely an exception, feeble and helpless. Their power passed to their vizirs, the Mayors of the Palace, who from about A.D. 638 onwards were kings *de facto*. But the Franks continued to revere the blood of Clovis, and when, in 656, a rash Mayor of the Palace had deposed a Merwing and placed his own son on the throne, they rose at once against the insult offered to the ancient line; and its scions were revered as titular heads of the nation for a century longer, till Pippin the Short, having induced the Pope to pronounce the deposition of the last Merwing and to sanction the transfer of the crown to himself, sent that prince into a monastery. This instance is the more remarkable because the Franks, being Christians in doctrine if not in practice, can hardly have continued to hold the divine origin of their dynasty.

The other fact to be dwelt upon is this, that where religion comes into the matter we discover an associative tendency of immense strength, which binds men into a community, and wins obedience for those who, whether as priests or as kings, embody the unity of

the community, who represent its collective relation to the Unseen Powers, who approach them with its collective service of prayers or sacrifice. Altars have probably done even more than hearths to stimulate patriotism, especially among those who, like the Romans, had a sort of domestic altar for every hearth, and kept up a worship of family and clan spirits beside the worship of the national gods. It may be said that the power of religion in welding men together and inducing them to obey kings or magistrates or laws is due to the element of Fear in religion. Such an element has no doubt been at work, but its influence is more seen in the requirement of sacrifices to the deities themselves than in enforcing obedience to the authorities and institutions of the State. What commends these latter to reverence is rather the belief that their divine appointment gives them a claim on the affection of the citizens, and makes it a part of piety as well as of patriotism to support them. In the Old Testament, for instance, the love of Jehovah, and the sense of gratitude to Him for his favours to His people, are motives invoked as no less potent than the dread of His wrath. There has always been a tendency, since Christianity lost its first freshness and power, to insist upon the more material motives, upon those which appear palpable and ponderable, such as the fear of future punishment, rather than on those of a more refined and ethereal quality. But it was not by appealing to these lower motives that Christianity originally made its way in the Roman Empire. The element of Fear, though not wholly absent from the New Testament, plays a very subordinate part there, and became larger

in mediaeval and modern times. Yet it may be doubted whether, in growing stronger, it increased the efficiency of Christianity as an engine of moral reform. 'Perfect love casteth out fear.' It was the gospel of love, and not the fear of hell, that conquered the world, and made men and women willing to suffer death for their faith. The martyrs in the persecutions under Decius and Diocletian, and the Armenian martyrs of 1895, who were counted by thousands, overcame the terror of impending torture and death, not from any thought of penalties in a world to come, but from the sense of honour and devotion which forbade them to deny the God whom they and their parents or forefathers had worshipped.

Returning to the general question of the disposition of the average man to follow rather than to make a path for himself, it may be remarked that the abstract love of liberty, the desire to secure self-government for its own sake, apart from the benefits to be reaped from it, has been a comparatively feeble passion, even in nations far advanced in political development. It is not easy to establish this proposition by instances, because wherever arbitrary power is exercised, there are pretty certain to be tangible grievances as well as a denial of liberty, and where a monarch, or an oligarchy, attempts to deprive a people of the freedom they have enjoyed, they conclude, and with good reason, that oppression is sure to follow. But when the sources of insurrections are examined, it will be almost always found that the great bulk of the insurgents were moved either by the hatred of foreign domination, or by religious passion, or by actual wrongs suffered. Those who in drawing the sword appeal to the love of

liberty and liberty only are usually a group of persons who, like the last republicans of Rome, are either exceptional in their sense of dignity and their attachment to tradition, or deem the predominance of a despot injurious to their own position in the State. So we may safely say that rebellions and revolutions are primarily made, not for the sake of freedom, but in order to get rid of some evil which touches men in a more tender place than their pride. They rise against oppression when it reaches a certain point, such as the spoiling of their goods by the tax-gatherer, the invasion of their homes by the minions of tyranny, the enforcement of an odious form of worship, or perhaps some shocking deed of cruelty or lust. Once they have risen, the more ardent spirits involve the sacred name of liberty and fight under its banner. But so long as the government is fairly easy and tolerant, the mere denial of a share in the control of public affairs is not acutely resented, and a great deal of paternally regulative despotism is acquiesced in.

In A.D. 1863, when Bismarck was flouting the Prussian Parliament, Englishmen were surprised at the coolness with which the Prussian people bore the violations of their not too liberal constitution. The explanation was that the country was well governed, and the struggle for political power did not move peasants and tradesmen otherwise contented with their lot. The English were a people singularly attached to their ancient political and civil rights, yet Charles the First might probably have destroyed the liberties of England, and would almost certainly have destroyed those of Scotland, if he had left religion alone. One

of the few cases that can be cited where a great movement sprang from the pure love of independence is the migration of the chieftains of Western Norway to Iceland in the ninth century, rather than admit the overlordship of King Harold the Fairhaired. But even here it is to be remembered that Harold sought to levy tribute: and the Norsemen were of all the races we know those in whom the pride of personality and the spirit of independence glowed with the hottest flame.

There are even times when peoples that have enjoyed a disordered freedom tire of it, and are ready to welcome, for the sake of order, any saviour of society who appears, an Octavianus Augustus or even a Louis Napoleon. The greatest peril to self-government is at all times to be found in the want of zeal and energy among the citizens. This is a peril which exists in democracies as well as in despotisms. Submission is less frequently due to overwhelming force than to the apathy of those who find acquiescence easier than resistance.

Two questions arising out of the view that has been here presented regarding the main sources of Obedience remain to be considered.

One of these, that which bears upon the theory of jurisprudence as a science, being somewhat technical, had better not be suffered to interrupt the course of the general argument. I have therefore relegated it to a note at the end of this essay.

III. The Future of Political Obedience.

The other question which deserves to be examined is a much wider one. We have inquired what have been the grounds of Obedience in the past, and how it

has worked in consolidating political society. We have seen that political society has depended upon the natural inequality in the strength of individual wills and in the activity of individual intellects, so that the weaker have tended to follow and shelter themselves behind the stronger, not so much because the stronger have compelled them to do so as because they have themselves wished to do so. But the conditions of human life and society have of late years greatly changed, and are still continuing to change, in the direction of securing wider scope for independence of thought and action. Society has become orderly, and physical violence plays a smaller and a steadily decreasing part. The multitude, in most of the civilized and progressive countries, can, if and when it pleases, exercise political supremacy through its voting power. There is very much less distinction of ranks than formerly, so that even those who dislike social equality are obliged to profess their love for it. And the opportunities of obtaining knowledge have become infinitely more accessible than they were even a century ago. Changes so great as these must surely—though of course they cannot alter the fundamental facts of human nature—modify the working of the tendencies and habits which man shows in political society. How far, then, are they likely to modify the tendency to Obedience, and in what way? In other words, What will be the relation of Obedience to democracy and to social equality?

It used to be believed, perhaps it is still generally believed, that with the advance of knowledge, the development of intelligence, and the accumulation of human experience, Obedience must necessarily decline, and that

therewith governmental control will decay or be deemed superfluous, the good sense of mankind coming in to do for themselves what authority has hitherto done for them. The familiar phrase 'Anarchy *plus* a street constable' was employed to describe the ideal of a government restricted to the fewest possible functions, as that ideal was cherished by the lovers of liberty and the apostles of *laissez-faire.* There is even a school counting among its members, besides a few assassins, many peaceful and tender-hearted theorists, men of high personal excellence, which maintains that all the troubles of the world spring from the effort of one man, or a group of men, or the general mass of a people, to regulate the relations and guide the conduct of individuals. To this school all forms of government are pretty nearly equally bad, and a Czar, though a more conspicuous mark for denunciation, is scarcely worse than is a Parliament.

The answer to this view, which is attractive, not merely because it is paradoxical, but because it is a protest against some really bad tendencies of human society, and whose ideal, however unattainable, offers larger prospects of pleasure than does that of the ultra-regulators, seems to be that Obedience is an instinct of human nature too strong and permanent to be got rid of, and that the extinction of the State machinery which rules by this instinct, and when necessary enforces its own authority by the strong arm, would not really secure freedom to the weak though it might facilitate oppression by the strong. To assume that human nature will change as soon as provisions for State compulsion have been withdrawn is to misread human nature as we have hitherto known it. Organizations there will be and must

be, even if existing governments come to an end: and every organization implies obedience, not only because large enterprises cannot otherwise be worked, but also because the direction, necessarily committed to a few, forms in those few the habit of ruling and disposes others to accept their control. The decline of respect for the State, or even the growth of a habit of disobedience to State authorities, so far from implying a decline in the motives and forces which produce obedience generally, may indicate nothing more than that people have begun to obey some other authorities, and so illustrate our proposition that the obedience rendered to authorities commanding physical force is not always nor necessarily the promptest and the heartiest. New forms of social grouping and organization are always springing up, and in these, if they are to strive for and attain their aims, discipline is essential, because it is only thus that success in a struggle can be won. To keep men tightly knit together power must be lodged in few hands, and the rank and file must take their orders from their officers. Such submission, due at starting partly no doubt to reason, which suggests motives of interest, but largely also to deference and to sympathy, with fear presently added, soon crystallizes into a habit. Any one who will watch any considerable modern movement or series of movements outside the State sphere will perceive how naturally and inevitably guidance falls into a few hands, and how largely success depends on the discipline which those who guide maintain among those who follow; that is to say, on the uniformity and readiness of obedience, and on the strength of the associative habit which makes them all

act heartily together. Whether it be a political party, or an ecclesiastical movement, or a combination of employers or of workmen, the same tendencies appear, and victory is achieved by the same methods.

I will name in passing three very recent instances, drawn from the country in which it might be supposed that subordination was least likely to be found, because the principles of democracy and equality have had in it the longest and the fullest vogue. One is to be found in the Boss system in American politics. Such party chieftains as Mr. Croker in New York City, Mr. Cox in Cincinnati, and the well-known masters of the Republican party in the great States of Pennsylvania and New York, wield a power far more absolute, far more unquestioned, than the laws of the United States permit to any official. One must go to Russia to find anything comparable to the despotic control they exert over fellow citizens who are supposed to enjoy the widest freedom the world has known. A second is supplied by the American trade unions, in which a few leaders are permitted by the mass of their fellow workmen to organize combinations and to direct strikes as practical dictators. A trade union is a militant body, and the conditions of war make the leader all-powerful. The third is to be found in the American Trusts or great commercial corporations, aggregations of capital which embrace vast industries and departments of trade employing many thousands of work-people, and which are controlled by a very small number of capable men. Modern commerce, like war, suggests the concentration of virtually irresponsible power in a few hands.

Whether we examine the moral constitution of man

or the phenomena of society in its various stages, we shall be led to conclude that the theoretic democratic ideal of men as each of them possessing and exerting an independent reason, conscience, and will, is an ideal too remote from human nature as we know it, and from communities as they now exist, to be within the horizon of the next few centuries, perhaps of all the centuries that may elapse before we are covered by the ice-fields again descending from the Pole or are ultimately engulfed in the sun.

What, then, is the most that a reasonable optimist may venture to hope for? He will hope that 'the masses' of democratic countries in the future, since they, like ourselves, must follow a small number of leaders, will ultimately reach a level of intelligence, public spirit and probity which will enable them to select the right leaders, will make the demagogue repulsive, will secure their deference for those whose characters and careers they can approve, and will so far control the associative instinct as to cause their adhesion to party to be governed by a moral judgement on the conduct of the party. The masses cannot have either the leisure or the capacity for investigating the underlying principles of policy or for mastering the details of legislation. Yet they may—so our optimist must hope—attain to a sound perception of the main and broad issues of national and international policy, especially in their moral aspects, a perception sufficient to enable them to keep the nation's action upon right lines. For the average man to do more than this seems scarcely more possible than that he should examine religious truth for himself, scrutinizing the Christian evidences and reaching in-

dependent conclusions upon the Christian dogmas. This is what the extreme Protestant theory, which exalted human reason in the religious sphere no less than democratic theory did in the political sphere, has demanded, and indeed must demand, from the average man. But how many Protestants seek to rise to it? Many of those who grew up under the influence of that inspiriting theory can recall the disappointment with which, between twenty and thirty years of age, they came to perceive that the ideal was unattainable for themselves, and that they must be content to form and live by such views of the meaning of the Bible and of the dogmas held to be deducible therefrom as a reliance on the opinions of the highest critical authorities and of their own wisest friends, coupled with their own limited knowledge of history and with the canons of evidence which they had unconsciously adopted, enabled them to form. Even this, however, has seemed to most of those who have passed through such an experience to be better than a despairing surrender to ecclesiastical authority.

So the optimist aforesaid may argue that the future for which he hopes will represent, not indeed the ideal which democracy sets up, yet nevertheless an advance upon any government the world has yet seen, except perhaps in very small communities or for a brief space of time.

The doctrine that the natural instinct and passion of men was for liberty, because every human being was a centre of independent force, striving to assert itself; the doctrine that political freedom would bring mental independence and a sense of responsibility; that education

would teach men, not only to prize their political rights, but also to use them wisely—this doctrine was first promulgated by persons of exceptional vigour, exceptional independence, exceptional hopefulness. These were the qualities that made such men idealists and reformers: and they attributed their own merits to the general body of mankind. It was an admirable ideal. Let us hold to it as long as we can. The world is still young.

Having heard the optimist, we must let the pessimist also state his case. If he is a reasonable pessimist, he will admit that Obedience may be expected to become more and more a product of reason rather than of mere indolence or timidity, because every advance in popular enlightenment or in the participation of the masses in government ought, after the first excitement of unchastened hopes or destructive impulses has passed away, to engender a stronger feeling of the common interest in public order, and of the need for subordinating the demands of a class to the general good. He will also admit that the progress of social equality may tend to increase each man's sense of individual dignity. But if he is asked to admit further that governments will become purer and better because there will come along with that habit of rational obedience (a habit necessary to enable any government to be efficient) a stronger interest in self-government, a more active public spirit, a constant sense of the duty which each citizen owes to the community to secure an honest and wise administration, he will observe that as we have seen that Obedience rests primarily upon certain instincts and habits woven

into the texture of human nature, these instincts and habits will be permanent factors, not necessarily less potent in the future than they have been in the past. He will then ask whether the events of the last seventy years, during which power has, at least in form and semblance, passed from the few to the many, encourage the belief that the spirit of independence, the standard of public duty, and the sense of responsibility in each individual for the conduct of government are really advancing.

Are the omens in this quarter of the heavens so favourable as we are apt to assume?

There is less love for liberty—so our pessimist pursues—than there used to be, perhaps less value set upon the right of a man to express unpopular opinions. There is less sympathy in each country for the struggles which are maintained for freedom in other countries. National antagonisms are as strong as ever they were, and nations seem quite as willing as in the old days of tyranny to forgo domestic progress for the sake of strengthening their militant force against their rivals. There is less faith in, less regard for, that which used to be called the principle of nationality. Peoples which have achieved their own national freedom show no more disposition than did the tyrants of old time to respect the struggles of other peoples to maintain theirs. The sympathy which Germans and Frenchmen used to feel for the oppressed races of the East has disappeared. France has ceased to care about the Cretans or the Poles. England, whose heart went out forty years ago to all who strove for freedom and independence, feels no compunction in blotting out two little

republics whose citizens have fought with a valour and constancy never surpassed. The United States ignore the principles of their Declaration of Independence when they proceed to subjugate by force the Philippine Islanders. The modern ideal is no longer liberty, but military strength and commercial development.

If freedom is less prized, it is perhaps because free governments have failed to bear the fruit that was expected from them fifty years ago. The Republic in France seems, after thirty years, to have made the country not much happier or more contentedly tranquil than it was under Louis Napoleon or Louis Philippe. It maintains, to the eyes of foreign observers, a precarious life from year to year, now and then threatened by plots military, political, or ecclesiastical. A free and united Italy has not realized the hopes of the great men to whom she owes her unity and her freedom. The United States have at least as much corruption in their legislatures, and worse government in their great cities, with fewer men of commanding ability in their public life, than before the Civil War, when it was believed that all evils would disappear with the extinction of slavery. In particular, representative government, in which the hopes of the apostles of progress were centred half a century ago, has fallen into discredit. In some countries the representative is more timid, more willing to be turned into a mere delegate, more at the mercy of a party organization, than he was formerly. In others the popular assembly is so much distrusted that men seek to override it by introducing a so-called plebiscite or referendum to review its decisions.

No result was more confidently expected from the enlightenment of the bulk of the people than the triumph, a speedy and complete triumph, of sound economic doctrines, such as those which prescribe the adoption of Free Trade in commercial legislation and reliance upon self-help rather than State-help in poor law matters and generally in social improvements. But the United Kingdom is the only country in which Free Trade holds the field, and in the United Kingdom the true and wholesome principles of poor law administration, as set forth by Chalmers and by the famous Commissioners of 1834, have rather lost than gained ground.

The doctrines of *Laissez-Faire* and Individualism have suffered an eclipse. The State interferes more and more with the power of the individual to do as he pleases. Its motives are usually excellent, but the result is to subject his life to a closer and more repressive supervision. This means more obedience, less exercise of personal discretion, less of that virtue which guides the self-determining will to choose the good and reject the evil. 'If every action,' says John Milton, 'which is good or evil in man at ripe years were to be under pittance, prescription and compulsion, what were virtue but a name—what praise could be then due to well-doing, what gramercy to be sober, just or continent?'

Nor is it only the State (whether through central or through local authorities) that threatens individual freedom. Masses of working men surrender themselves to the control of the few chiefs of their trade organization, who are hardly the less despotic in fact because they are elected and because they are nominally subject to a control which those who have elected them

cannot, from the nature of the case, effectively exert[1]. Thus there is, instead of more independence, always more and more obedience.

To one who believes the principles of Free Trade and Self-Help to be irrefragably true this means that the bulk of the people are not, as was formerly expected, thinking for themselves, perhaps are not capable of thinking for themselves, while those persons who are capable fear to contend for doctrines which happen to be unpopular because opposed to ignorant or superficial views of what is the interest of a nation or of the most numerous class in the nation.

In the enlightenment of the people, which was to increase their independence of spirit and their zeal for good government, the chief part was to be played by the public press. Its influence has increased beyond the most sanguine anticipations of the last generation of reformers whether in Great Britain or in Continental Europe. It employs an enormous amount of literary talent. Nothing escapes its notice. But in some countries it has become a powerful agent for blackmailing; in others it is largely the tool of financial speculators; in others, again, it degrades politics by vulgarizing them, or seeks to increase its circulation by stimulating the passion of the moment. Pecuniary considerations cannot but affect it, because a newspaper is

[1] This pessimist omits to notice that interference by the State or by such quasi-despotic combinations of workmen may have been deemed the only means of escaping from submission to organizations of capitalists capable of exercising a tyranny through the forms of the law. He would however reply that this fact did not tell against his thesis that, one way or another, people are not becoming more fully masters of their own lives and fates.

a commercial concern, whose primary aim is to make a profit. Almost everywhere it tends to embitter racial animosities and make more difficult the preservation of international peace. When it tells each man that the views it expresses are those of everybody else, except a few contemptible opponents, it increases the tendency of each man to fall in with the views of the mass, and confirms that habit of passive acquiescence which the progress of enlightenment was once expected to dispel.

The growth in population of the great industrial nations, such as Germany, England, and the United States, may tend to dwarf the sense in each man of his own significance to the whole body politic, and dispose him to make less strenuous efforts than he would have put forth had he thought his own exertions more likely to tell upon the community. The vaster the people the more trivial must the individual appear to himself, and the more readily will he fall in with what the majority think or determine.

The rise of wages among the poorer classes and the bettering of material conditions in all classes were expected to give the bulk of the people more leisure, and it was assumed that this would induce them to bestow more attention upon public affairs and so stimulate them in the discharge of civic duties. Wages have risen everywhere, notably in England and the United States, and material conditions have improved. But new interests have therewith been awakened, and pleasures formerly unattainable have been brought within the reach of every class except the very poorest. Whatever other benefits this change brings, it has not tended

to make civic duty more prominent in the mind of the average man. With some, material enjoyments, with others physical exercise, or what is called sport (including the gambling that accompanies many kinds of sport), with others the more refined pleasures of art or literature, have come in to occupy the greatest part of such time and thought as can be spared from daily work; and public affairs receive no more, perhaps even less, of their attention than was formerly given.

May it not even be that material comfort and the surrender of one's self to enjoyment, whether directed towards the coarser or towards the worthier pleasures, tend in softening the character, to relax its tension, or at least to indispose it to rough work? To a fine taste things in which taste cannot be indulged become distasteful. Thus high civilization may end by increasing the sum of human indolence, at least so far as politics are concerned, and indolence is, after all, the prime source of Obedience. Some things no doubt men will continue to value and (if need be) to defend, because they will have come to deem them essential. Freedom of Thought and Speech is probably one of these things, though the multitude occasionally shows how intolerant it can be when excited. Civil Equality is another; the respect for private civil rights, with a tolerably fair administration of justice for enforcing those rights, is a third. These have rooted themselves in Germany and England, for instance, and (with some few local exceptions) in the United States, as necessaries to existence. But can the same thing be said of political freedom, that is, of the right to control, by constitutional machinery, the government of the State?

Is it not possible that the disposition to acquiesce and submit without the application of compulsive force may be as strong under these new conditions as it ever was before? possible that an educated and intelligent people might, if material comfort and scope for intellectual development were secured, grow weary of political contention, and submit to the despotism, perhaps of a regular monarch, perhaps of a succession of adventurers, which, tempered in some degree by public opinion, should secure peace, order and commercial prosperity? The thing has happened before. For five centuries the people who had been the most politically active and who remained the most intelligent and most civilized in the world made no effort to recover the political freedom they had lost, having indeed, within a generation or two, ceased even to think of it.

So far our pessimist. He has obviously omitted, not only some facts which make against the gloom of his picture, but also other facts incidental to the phenomena on which he dwells, which qualify their import or indicate that they may be merely transient. The most serious part of the case which he endeavours to make against the old theory that democratic government fosters the attachment to freedom, stimulates civic zeal, and intensifies the independent spirit of the citizen, is the suggestion that the vast size of modern nations, and the insignificance of the individual man as compared to the multitude around him, tend to dwarf his personal sense of responsibility and to depress his hopes of withstanding whatever sentiment or opinion may be for the time predominant. The rule of the majority, if it induces the belief that the majority must be right, or at any rate

that the majority is irresistible[1], brings back the old dangers of submission. So the familiar tendency to follow and obey, rather than to think and act for one's self, may be even stronger in a democracy than it was under the monarchies of earlier days.

If, now that both sides have been heard, we are to attempt to answer the question propounded some pages back, our answer must be that despite the changes which have passed upon the modern world, the tendencies of human nature which make for obedience have not become, and are not likely to become, less powerful than they were. That they should disappear is not to be desired, for they are useful tendencies, without which society would not hold together. But they have not been reduced even so far as the reasonable friends of progress might wish. In the sphere of religion the compulsion once exercised, not merely by force, but also by public opinion, has doubtless in most countries declined. There is also a larger and freer play of thought and taste in all matters not appertaining to collective action, that is to say, in matters involving no collision of wills. But where this collision arises, as in the spheres of politics and industry, the disposition of the average man to defer and fall into line, the tendency of the stronger will to prevail because it is the stronger, are as great as ever they were before. Physical force plays a smaller part than it did in the ruder ages. But Indolence, Deference, and Sympathy, rather than Reason and

[1] Some remarks upon this feature of the United States may be found in the author's *American Commonwealth*, vol. ii. chap. lxxxv, 'The Fatalism of the Multitude.'

the pride of personal independence, have filled the void which the less frequent appeal to physical force has left.

So far as the question touches England, it may be that the friends of progress and freedom of the last generation, the generation of Mazzini and Garrison and Cobden and Gladstone, assumed too hastily that the reforming ardour and other civic virtues which had been evoked by the long battle of Englishmen against monarchy and oligarchy and class legislation would remain unabated, after the battle had been won, in days which see popular self-government an ordinary part of daily life. When the grosser abuses in administration have been removed, when everybody's rights have been recognized, when new questions, far more intricate and difficult, but less exciting, have arisen, when it is not destruction—a thing everybody can clamour for—but constructive legislation that is needed, public interest may flag and politics cease to stir emotion as they formerly did. Just as in Italy the struggle for national unity and freedom called to the front in the first half of the nineteenth century a brilliant and lofty group of men, who have left few successors, so it may be that the normal attitude of a people towards its public life, and the normal attraction which public life has for fine characters and high talents, will fall short of that which has marked the periods of conflict over great principles. The standard will not therefore, even should it now be sinking, rest at a point lower than that at which average humanity has stood through past ages, though it will be lower than that to which exceptional needs, rousing strong emotions and inspiring golden hopes, had uplifted men during the days of conflict.

There is, however, a further reply to be made to our pessimist before we part from him. Even supposing that the ideals which democratic theory sets up have not advanced towards realization, that the love of freedom and justice has declined, and that the tendency to indifference, to acquiescence in a dominant opinion, or to unthinking adherence to some organization, is stronger than was expected some forty years ago, these may be only transitory phenomena. In a striking passage of his *Constitutional History of England* (vol. ii. chap. 17), Bishop Stubbs comments on the moral and political decline of the men of the fourteenth century from the level of the thirteenth, but observes that unseen causes were already at work which after no long interval restored the tone and spirit of England. It has often been so in history, though no generation can foretell how long a period of intellectual or moral depression will endure.

NOTE TO THE ABOVE ESSAY

ON THE APPLICATION OF THE THEORY OF OBEDIENCE TO THE FUNDAMENTAL DEFINITIONS OF JURISPRUDENCE.

THE school of jurisprudence which follows Bentham defines a Law as a Command of the State, represents every law as resting solely upon the physical force of the State, through the threat of punishment to those who transgress the law, and finds in the fear of punishment the sole motive of the obedience rendered by the citizens.

There are three objections to this doctrine and definition. The first is that if it is meant, as the generality of language used by its propounders implies, to apply to all political communities, it is untrue as matter of history, because it suggests a false view of the origin of law, and is inapplicable to the laws of many communities. There have been peoples among whom there was a law but no State capable of enforcing obedience. In all communities there have been laws which were in fact obeyed, but which were not deemed by the people to have emanated from the State. The great bulk of the rules which determine the relations of individuals or groups to one another have in most countries, until comparatively recent times, rested upon Custom—that is to say, upon long-settled practice which everybody understands and in which everybody acquiesces. In such countries customs were

or are laws, and do not need to be formally enounced in order to secure their observance by the people. Custom is simply the result of the disposition to do again what has been done before. What Habit is to the individual, Custom is to the community.

The second objection is that, even in mature States where there exist public authorities regularly exercising legislative functions, most laws do not belong in their form or their meaning to the category of commands. In order to make them seem commands a forced and unnatural sense must be put upon them, by representing the State as directly ordering everything to which it is prepared to give effect. Statute law takes the form of a command more often than does any other kind of law. Yet even in English statute law administrative statutes, which now constitute a large part of that law, are usually couched in the form, not of an order to a public body or an official to do such and such a thing, but of an authorization which makes action legal which might otherwise have been illegal. This distinction, though somewhat technical, nevertheless indicates the unsuitability of the definition. As for that part of the law of a country which determines the private rights of the citizens towards one another, as for instance the conditions attaching to commercial and other contracts, their interpretation, the liability they create, or, again, the rights of succession to property, and the modes of dealing with heirship or bequests—this largest and most important part of the law does not consist of commands. The rules of which it consists are declarations of the doctrines which the Courts have applied and will apply; or they are, if you like,

assurances given by the State that it will, with physical force at its disposal, take a certain course in certain events, and thus they become instructions helpful to the citizens, showing them how they may get the law, and physical force, on their side in civil disputes. But they are not, in any natural sense of the word, Commands. This is obvious enough in English law, where most of such rules are to be gathered from the reports of decided cases: but the same thing is substantially true of those countries which have embodied in statutory form their rules upon these matters. The point is not merely one of form or phrase, though it may at first sight seem to be so. It goes deeper; it carries one back to the origin of these laws, and bears upon their inherent nature. In fact the only branch of law which is properly covered by the definition I am examining is Penal or Criminal (with certain parts of administrative) law, for this branch does consist of express orders or prohibitions accompanied by threats of punishment. It may be conjectured that the Benthamites took their notion of law in general from this particular department of it, or perhaps from the Ten Commandments in the Book of Exodus, which, though no doubt good examples of the categorical imperative, are anything but typical of law in general.

If the Benthamites had been content to distinguish rules which the State enforces from courses of conduct which opinion supports, the distinction, though an older and more obvious one than they supposed, would have its worth. The definition of a law as that which the State is prepared to enforce fits a modern State, though not universally applicable to early communities. But the

Benthamite definition goes further, and may be misleading even as regards modern laws generally.

The third objection to this definition is that it is not primarily or chiefly Fear which is the source of Obedience. It is not Physical Force that has created the State whence (according to this doctrine) laws issue and by which they are applied. It is not through Force that kings reign and princes decree justice. According to the Hebrew Scriptures it is by God that they reign. According to Homer it is Zeus who has given to the king the sceptre and the dooms, that therewith he may rule. Both expressions convey the same truth, that it is by the natural or providential order of things, and in virtue of the constitution of man as a social being, that men are grouped into communities under leaders who judge among them. The tendency to aggregation, to imitation, to compliance and submission, is the basis on which the State is built. It is of course not only true but obvious that the State must have physical strength at its disposal in order to make the law obeyed. The capacity for applying compulsion holds the State together. But why is it that the State is able to apply force? Because, in the ordered and normal State, the same influences which have drawn men together keep them together, and make them willingly yield to the State the physical strength, and the money which purchases physical strength, needful for its purposes. Where a ruler rules by pure force (apart from the consent of the community), he is what the Greeks called a Tyrant, or the Italians in the fourteenth century a Signore, a Usurper reigning in defiance of law by means of armed men, an Adventurer who has risen by a revolution, is supported by

the soldiery, and will fall when they turn against him. Such Tyrants are represented in our own day by the Presidents in some of the Spanish Republics of Central and South America. Pure Force is really the most unstable foundation on which either the State or Law can rest.

Thus the same conclusion to which history leads is also enjoined on us by a consideration of the psychological or sociological grounds which induce obedience, and the Benthamic definition is perceived to be unsound. These curt and often sweeping definitions usually are unsound. They are not simple, although they are summary. They are arbitrary and artificial, concealing under few words many fallacies. Human nature and human society are too complex to be thus dealt with.

X

THE NATURE OF SOVEREIGNTY

I. Preliminary.

As the borderland between two kingdoms used in unsettled states of society to be the region where disorder and confusion most prevailed, and in which turbulent men found a refuge from justice, so fallacies and confusions of thought and language have most frequently survived and longest escaped detection in those territories where the limits of conterminous sciences or branches of learning have not been exactly drawn. The frontier districts, if one may call them so, of Ethics, of Law, and of Political Science have been thus infested by a number of vague or ambiguous terms which have provoked many barren discussions and caused much needless trouble to students. The words which serve as technical expressions in adjacent departments of knowledge are sometimes employed in slightly different senses in those different departments; and neither in Ethics nor in Politics has a well-defined terminology become accepted. It is only of late years, when philosophy in becoming less creative has become more critical, that there has been established on the confines of these three sciences a comparatively vigilant police, which is competent, at least in the realm of law, to arrest suspicious phrases and propositions, and subject them to a rigorous examination.

No offender of this kind has given more trouble than the so-called 'Doctrine of Sovereignty.' The controversies which it has provoked have been so numerous and so tedious that a reader—even the most patient reader—may feel alarmed at being invited to enter once again that dusty desert of abstractions through which successive generations of political philosophers have thought it necessary to lead their disciples. Let me therefore hasten to say that my aim is to avoid that desert altogether, and approach the question from the concrete side. Instead of attempting to set forth and analyse the doctrines of the great publicists of the sixteenth and seventeenth centuries—Bodin, Althaus, Grotius, Hobbes, and the rest—or the dogmas delivered by Bentham and Austin, who represent the school that has had most influence during the last seventy years in England, I will assume the views of these and similar writers to be sufficiently known, and will reserve criticisms upon them till we have seen whether there may not be found a conception and definition of the thing more plain, simple, and conformable to the facts, than could well have been reached by those who, living in the midst of acute political controversies, were really occupied in solving problems which belonged to their own time, and which now, under changed conditions, seem capable of receiving an easier solution. If we succeed in finding such a conception, we may return to inquire why the modern successors of Hobbes, who had not the same need for a theory as he had, worried themselves over what was really a question rather of words than of substance.

It is well to begin by distinguishing the senses in which the word Sovereignty is used. In the ordinary popular sense it means Supremacy, the right to demand obedience. Although the idea of actual power is not absent, the prominent idea is that of some sort of title to exercise control. An ordinary layman would call that person (or body of persons) Sovereign in a State who is obeyed because he is acknowledged to stand at the top, whose will must be expected to prevail, who can get his own way, and make others go his, because such is the practice of the country. Etymologically the word of course means merely superiority[1], and familiar usage applies it in monarchies to the monarch, because he stands first in the State, be his real power great or small.

II. Legal Sovereignty (*De Iure*).

For the purposes of the lawyer a more definite conception is required. The sovereign authority is to him the person (or body) to whose directions the law attributes legal force, the person in whom resides as of right the ultimate power either of laying down general rules or of issuing isolated rules or commands, whose authority is that of the law itself. It is in this sense, and in this sense only, that the jurist is concerned with the question who is sovereign in a given community. In every normal modern State there exist many rules purporting to bind the citizen, and many public officers who are entitled, each in his proper

[1] The heads of monasteries seem to have been sometimes familiarly described as Sovereigns in the Middle Ages. The name Sovereign was down till very recent times used to describe the head of a municipality in several Irish boroughs. Probably other similar instances might be collected.

sphere, to do certain acts or issue certain directions. Who has the right to make the rules? Who has the right to appoint and assign functions to the officers? The person or body to whom in the last resort the law attributes this right is the legally supreme power, or Sovereign, in the State. There may be intermediate authorities exercising delegated powers. Legal sovereignty evidently cannot reside in them; the search for it must be continued till the highest and ultimate source of law has been reached.

A householder in a municipality is asked to pay a paving rate. He inquires why he should pay it, and is referred to the resolution of the Town Council imposing it. He then asks what authority the Council has to levy the rate, and is referred to a section of the Act of Parliament whence the Council derives its powers. If he pushes curiosity further, and inquires what right Parliament has to confer these powers, the rate collector can only answer that everybody knows that in England Parliament makes the law, and that by the law no other authority can override or in any wise interfere with any expression of the will of Parliament. Parliament is supreme above all other authorities, or in other words, Parliament is Sovereign.

The process of discovering the Sovereign is in all normal modern States essentially the same. In an autocracy like that of Russia it is generally very short and simple, since all laws (except customs having legal force) and executive orders emanate directly or indirectly from the Czar, and by the law the Czar is the sole legislative authority. Both these cases are simple and easy, because we speedily reach one Person, as in Russia,

or one Body of Persons, as in Britain, to whom the law attributes Sovereignty. But there are cases which present more difficulty, though the principles to be applied are the same.

In a country governed by a Rigid Constitution which limits the power of the legislature to certain subjects, or forbids it to transgress certain fundamental doctrines, the Sovereignty of the legislature is to that extent restricted. Within the sphere left open to it, it is supreme, while matters lying outside its sphere can be dealt with only by the authority (whether a Person or a Body) which made and can amend the Constitution. So far as regards those matters, therefore, ultimate Sovereignty remains with the authority aforesaid, and we may therefore say that in such a country legal Sovereignty is divided between two authorities, one (the Legislature) in constant, the other only in occasional action.

Another class of cases arises in a Federal State, where the powers of government are divided between the Central and the Local Legislatures, each having a sphere of its own determined by the constitution of the federation. In such a State the power of making laws belongs for some purposes to the Central, for some to the Local Legislatures. Thus in the United States, while Congress is everywhere the supreme legislative power for some subjects, the tariff, for instance, or copyright, or inter-state commerce, the legislature of each State is within that State supreme for other subjects, the law of marriage, for instance, or of sale, or of police administration. Each legislature therefore (Congress and the State Legislature) has only a part of the sum total of supreme legislative power;

and each is moreover further limited by the fact that the Constitution of the United States restricts the general powers of Congress by forbidding it to do certain things, while the powers of each State Legislature are restricted not only by the Constitution of the particular State but by the Constitution of the United States also. These complications, however, do not affect the general principle. In every country the legal Sovereign is to be found in the authority, be it a Person or a Body, whose expressed will binds others, and whose will is not liable to be overruled by the expressed will of any one placed above him or it. The law may, in giving this supremacy, limit it to certain departments, and may divide the whole field of legislative or executive command between two or more authorities. The Sovereignty of each of these authorities will then be, to the lawyer's mind, a partial Sovereignty. But it will none the less be a true Sovereignty, sufficient for the purposes of the lawyer. He may sometimes find it troublesome to determine in any particular instance the range of action allotted to each of the several Sovereign authorities. But so also is it sometimes troublesome to decide how far a confessedly inferior authority has kept within the limits of the power conferred upon it by the supreme authority. The question is in both sets of cases a question of interpreting the law, which defines in the one case the sphere of power, in the other case the extent of delegation actually made; and this difficulty nowise affects the truth that legal Sovereignty is capable of being divided between co-ordinate authorities, or of being from time to time interrupted, or rather overriden, by the action of a power not regularly at

work. It will be understood that I am now dealing with Legal Sovereignty only, and not at this stage touching the question of whether, from the point of view of philosophic theory, Sovereignty is capable of division.

Finally, let it be noted that where Sovereignty is divided between two or more authorities, one of those (or possibly even more than one) may have executive functions only. Where there is but one Sovereign Person or Body, that Person or Body will evidently have both legislative and executive powers, *i. e.* will be entitled to issue special commands as well as to prescribe general rules. But a division of Sovereignty may assign legislative functions to one authority, executive to another. In the United States, for instance, the President is, by the Constitution, Sovereign for certain executive purposes (*e.g.* the command of the army), and the legislature cannot deprive him of that Sovereignty. If Congress were to pass an Act taking the command of the army from him, that Act would be void. So in England four centuries ago, although Parliament was already beginning to be recognized as sovereign for legislative purposes, the king had, in some departments, an executive sovereignty which the two Houses of Parliament did not dispute; and he laid claim in the time of the first two Stuarts to a sort of concurrent legislative sovereignty, which it required first a civil war and then a revolution finally to negative and extinguish.

So also it has been argued that Legal Sovereignty may be temporary, yet complete while it lasts, as was that of a Roman dictator. The phenomenon is so rare that we need not spend time on discussing it; but there seems to be in principle nothing to prevent absolute

legal control from being duly vested in a person or body of persons for a term which he, or they, cannot extend.

The kind of Sovereignty we have been considering is created by and concerned with law, and law only. It has nothing to do with the actual forces that exist in a State, nor with the question to whom obedience is in fact rendered by the citizens in the last resort. It represents merely the theory of the law, which may or may not coincide with the actual facts of the case, just as the validity of the demonstration of the fifth proposition in the first book of Euclid has nothing to do with the accuracy with which the lines of any actual figure of that proposition are drawn. The triangle in the figure which appears in a particular copy of the book may not have equal sides, nor the angles at the base be equal; this does not affect the soundness of the proof, which assumes the correctness of the figure. So law assumes, and must assume all through, that the machinery required for its enforcement is working *in vacuo*, steadily, equably, and in a manner capable of overcoming resistance. The actual receiving of obedience is therefore not (as some have argued) the characteristic mark of a Sovereign authority, but is a postulate of the law with regard to each and every of the authorities it recognizes. Penal laws no doubt contemplate transgression, but they assume the power of overcoming it. With the fact that obedience is in any given community rendered imperfectly or not rendered at all, Law as such has nothing to do. In other words, the question of where Legal Supremacy resides is a pure question of Right as defined by law. The Sovereign who exists as of right (*de iure*) has not necessarily anything to do with the

Sovereign who prevails in fact (*de facto*), though, as we shall see presently, the two conceptions, however distinct scientifically, exercise a significant influence each on the other.

Further: the question, Who is Legal Sovereign? stands quite apart from the questions, Why is he Sovereign? and, Who made him Sovereign? The historical facts which have vested power in any given Sovereign, as well as the moral grounds on which he is entitled to obedience, lie outside the questions with which Law is concerned, and belong to history, or to political philosophy, or to ethics; and nothing but confusion is caused by intruding them into the purely legal questions of the determination of the Sovereign and the definition of his powers. Even the manner in which, or the determination of the persons by whom, the Legal Sovereign is chosen is a matter distinct from the nature and scope of his authority. He is not the less a Sovereign in the contemplation of law because he reigns not by his own right but by the choice of others, as an elective monarch (like the Romano-Germanic emperor) did, or as an elective assembly does to-day. The appointing body, even if it can in a stated way and at a stated time recall its appointment, is not sovereign over him while his powers last. The fact that the House of Commons, a part of the Legal Sovereign of England, is chosen by the people, and that many members of the House of Lords, another part of the Legal Sovereign, have been appointed by the Crown, does not affect the Sovereignty of Parliament, because neither the people nor the Crown have the right of issuing directions, legally binding, to the persons they have selected.

We have already seen that Legal Sovereignty may be limited or divided. But it is further to be noted that the totality of possible legal sovereignty may, in a given State, not be vested either in one sovereign or in all the sovereign bodies and persons taken together. In other words, there may be some things which by the constitution of the State no authority is competent to do, because those things have been placed altogether out of the reach of legislation. We have already remarked that all the American constitutions, for instance, both State and Federal, forbid the legislature to interfere with the so-called 'primordial rights' of the citizen. There is thus in the United States no authority invested with legal power, in time of peace, to prohibit public meetings not threatening public order, or to suppress a newspaper. It is true that the people of each State (or of the Union) retain the power to alter their Constitution, but until or unless they do alter it the acting legal Sovereign remains debarred from an important part of the power of Sovereignty. And we may imagine a case in which a Constitution has been enacted with no provision for any legal method of amending it[1]. In fact, a somewhat similar condition of things exists in all Musulman countries. In Turkey, the Sultan, though Sovereign, is subject to the Sheriat or Sacred Law, which he cannot alter; and which no power exists capable of altering. A good deal may be done in the way of interpretation; and the desired Fetwa or solemnly rendered opinion of the Chief Mufti or Sheik-ul-Islam

[1] This seems to be the case in Spain. Some of the republics of antiquity professed to have unchangeable laws, but few, if any, of these fully answered to the conception of a Rigid Constitution as we understand it. See Essay III, vol. i. p. 145.

can generally be obtained by adequate extra-legal pressure on the Sultan's part. But no Sultan would venture to extort, and probably no Mufti to render, a fetwa in the teeth of some sentence of the Koran itself, which, with the Traditions, is the ultimate source of the Sacred Law, binding all Muslims always and everywhere.

III. Practical Sovereignty (*De Facto*).

We may now turn back to the more popular meaning in which the term Sovereignty is used by others than lawyers[1]. Even to the ordinary layman it generally seems to convey some sort of notion of legal right, yet it may be, and sometimes has been, used to denote simply the strongest force in the State, whether that force has or has not any recognized legal supremacy. This strongest force may be a king, or an assembly, or an oligarchic group controlling a king or an assembly, or an army, or the chief or chiefs of an army. It may be and ought to be the legal sovereign, or it may be quite distinct from the legal sovereign and possess no admitted status in the Constitution. The expression is perhaps most frequent in the phrase 'Sovereign Power,' which carries with it the idea of its being, whether legal or not, at any rate irresistible. We may define this dominant force, whom we may call the Practical Sovereign, as the person (or body of persons) who can make his (or their) will

[1] I pass by the sense in which it is applied to the person of a monarch, whether limited or absolute, as the king is in any country called the Sovereign, because that sense is not liable to be confused with the purely legal sense. A Nominal Sovereign need not be, and often is not, either a Legal or a Practical Sovereign.

prevail whether with the law or against the law. He (or they) is the *de facto* ruler, the person to whom obedience is actually paid.

It is better not to say 'the person who compels obedience' or 'the person who commands physical force,' because it may not be under positive compulsion, but in virtue of other sources of power than the command of physical force, that obedience is in fact rendered. Religious influence or moral influence or habit may dispose men not only themselves to obey, but to place their service in making others obey at the disposal of the person to whom such influence belongs. A priest or a prophet may be stronger than the king.

The best instances of the Practical or Actual Sovereign are to be found in communities where legal sovereignty is in dispute or has disappeared. Cromwell when he dissolved the Long Parliament, Napoleon when he overthrew the Directory, the Convention when it offered the Crown of England to William and Mary, the Constituent Assembly in France in 1871 when it made peace with Germany before any regular republican constitution had been adopted for France, were actually Sovereign. Even where a Legal Sovereign exists, there are sometimes particular persons or groups who stand out as able to control the State. However, although Thucydides speaks of Pericles as exercising practical control in Athens, it would be going too far to apply to him or to any person in his position such a description as that of *de facto* sovereign. In most of the South American republics the Practical Sovereign is the army, or a general (or combination of generals) whom the army, whether or no this general

be in fact President, will follow. In Egypt, though the Legal Sovereign is the Khedive—for little regard need be had to the theoretical suzerainty of the Turk, which is put in force only when the European Powers choose to use it for their own purposes—the Practical Sovereign has for some years past been the British Government. In Rome, after the revolution which overthrew the Republic, the Practical Sovereign was Octavianus Augustus, though the Legal Sovereignty remained vested in the People, subject to the claim of the Senate to exercise certain powers. In Syracuse under Dionysius the Elder, in Florence under Lorenzo dei Medici, each of those tyrants was Practical Sovereign, though neither enjoyed legal supremacy. In England people are accustomed to call the House of Commons the 'sovereign power,' though the law makes the consent of the other House and that of the Crown just as necessary to the validity of a statute as is that of the representatives of the people. In Denmark within our own time the Practical Sovereign was for some years the King, because the Constitution, which gives legal sovereignty to the Legislature and King together, was for a while virtually in abeyance, there having been a struggle and deadlock during which the Crown retained its ministers and raised taxes without the concurrence of the popular house. One might refer, by way of illustration, to cases in which some private organization exerts a power which interferes with that of the *de iure* government. Such was the Vehmgericht in Westphalia in the fifteenth century, such, on a much smaller scale and in a less effective way, were the Molly Maguires of Pennsylvania and the Mafia of Sicily. But

these cases lie quite outside our definition: as do those of monarchies in which a strong minister or a father confessor or even a court favourite has held the position of Practical Sovereign, that is to say, has been the person who would and could have his way, wielding the powers of the State at his sole pleasure through his influence upon the will of the titular sovereign[1].

The Musulman world furnishes two instances which deserve a passing word. The Mogul Emperors after Aurungzebe continued to be sovereigns *de iure* for a long time in Northern and Central India, though it was hard to say, till the East India Company extended its conquests far inland, who was sovereign *de facto*. Since the time of Sultan Selim the First (A. D. 1516) the Turkish Sultans have been (in large measure) Khalifs *de facto*. They claim to be Khalifs *de iure*, but the better opinion among Muslim sages is that the Khalif must be, as were the Ommiyads and the Abbasides, of the tribe of the Khoreish, to which Muhamad belonged, and in matters of such high sanctity long possession *de facto* makes no difference. Possibly therefore the Shereef of Mecca may be better entitled to call himself the Khalif *de iure*, entitled to the obedience of all the Faithful.

Where the Legal is not also the Practical Sovereign, it is obviously a far more difficult task to discover the latter than the former. As respects legal power there are the fixed rules of law, which in communities that have reached a certain stage of development indicate clearly the person (or body) to whom the ultimate right

[1] During part of Lewis the Fifteenth's reign Madame Du Barry might almost have been, and probably was, described as sovereign *de facto* of France.

of legislation, or of issuing executive orders, belongs. But the political philosopher or historian who wishes to ascertain the actually strongest force in a State lacks the guidance of such rules as the lawyer possesses. He has to do with facts which are uncertain, with forces which are imponderable. In no two countries, moreover, are the phenomena of Practical Sovereignty quite the same. Nevertheless it is true that there is in every State a Strongest Force, a power to which other powers bow, and of which it may be, more or less positively, predicted that in case of conflict it will overcome all resistance. Here, however, we come upon one of the many difficulties that beset an inquiry into practical supremacy. Are we to take a condition of peace, and ask whose will actually prevails while peace lasts, or are we to suppose a condition of war, and ask who would prevail if the strife between contending authorities were to be fought out by physical force? In the before-mentioned case of Denmark, for instance, though the Crown practically carried on the government, it was by no means clear that, if an insurrection broke out, the Crown would prove to be stronger than the popular chamber or those who supported it. In such inquiries the precision with which Legal Sovereignty can be determined is unattainable, for the political student finds that the terms suited to the phenomena of one country are unsuited to those of another, and that his general propositions regarding the actually Sovereign Powers must be subject to so many qualifications that they virtually cease to be general.

We have, however, found in every political com-

munity two kinds of Sovereign, belonging to two different spheres of thought, the Sovereign *de iure* and the Sovereign *de facto*. Let us see what are the relations of the two conceptions, or the two concrete persons, each to the other.

IV. The Relations of Legal to Practical Sovereignty.

The Sovereign *de iure* may also be the sovereign *de facto*. He ought to be so; that is to say, the plan of a well-regulated State requires that Legal Right and Actual Power should be united in the same person or body. Right ought to have on its side, available for its enforcement, physical force and the habit of obedience. Where Sovereignty *de facto* is disjoined from Sovereignty *de iure*, there will not necessarily be a collision, because the former power may act through the latter. But there is always a danger that the laws will be overridden by the Practical Sovereign and disobeyed by the citizens.

Sovereignty *de iure* and Sovereignty *de facto* have a double tendency to coalesce; and it is this tendency which has made them so often confounded.

Sovereignty *de facto*, when it has lasted for a certain time and shown itself stable, ripens into Sovereignty *de iure*. Sometimes it violently and illegally changes the pre-existing constitution, and creates a new legal system which, being supported by force, ultimately supersedes the old system. Sometimes the old constitution becomes quietly obsolete, and the customs formed under the new *de facto* ruler become ultimately valid laws,

and make him a *de iure* ruler. In any case, just as Possession in all or nearly all modern legal systems turns itself sooner or later through Prescription into Ownership—and conversely possession as a fact is aided by title or reputed title—so *de facto* power, if it can maintain itself long enough, will end by being *de iure*. Mankind, partly from the instinct of submission, partly because their moral sense is disquieted by the notion of power resting simply on force, are prone to find some reason for treating a *de facto* ruler as legitimate. They take any pretext for giving him a *de iure* title if they can, for it makes their subjection more agreeable and may impose some restraint upon him.

Sovereignty *de iure* in its turn tends to attract to itself sovereignty *de facto*, or, in other words, the possession of legal right tends to make the legal sovereign actually powerful. Hence a ruler *de facto* is always anxious to get some sort of *de iure* title, and Louis Napoleon, who had seized power by violence in 1851, thought himself, and doubtless was, more secure after he had got two (so-called) plebiscites in his favour in 1852, recognizing him first as President for ten years and then Emperor. This is not merely because the Legal Sovereign has presumably a moral claim to obedience—I say presumably, because he may have forfeited this claim by tyranny—but also because most men are governed and all are influenced by Habit, and therefore tend to go on obeying the person they have theretofore obeyed. It is moreover easier, in case of conflict, to know who is *de iure* sovereign than to foretell who will prove to be sovereign *de facto*; and whereas the *de iure* sovereign is certain, if victorious, to punish as

rebels those who have opposed him, the *de facto* sovereign, having been himself a rebel, may possibly be more indulgent. Under King Henry the Seventh in England express provision was made by statute for the protection of persons obeying a *de facto* king[1]. Accordingly, when strife arises between two persons or bodies of nearly equal physical resources, each claiming authority, the person who has the better legal claim will usually have the better prospect of success, and the ordinary citizen will be safer in siding with him. This is one of the reasons why conspiracies and insurrections, even against the worst *de iure* sovereigns, so often fail.

Similarly it happens that where sovereignty *de iure* is in dispute and uncertain, strife is likely to trouble the practical sphere in the hands of the claimant who for the moment holds the government *de facto*; and this not merely because some of the people are zealous to support rights which they think infringed upon, but also because the sense of stability which supports a government has been impaired, and the usual check on a resort to physical force thereby removed.

When a sovereign has been long and quietly established *de iure*, the distinction between law and fact is forgotten, and people assume that whoever has the legal right will also as a matter of course have the physical force to support it. This tends to make the distinction forgotten. Conversely, when *de facto* sovereignty is frequently in dispute, as happened in the Roman Empire during part of the third century A. D., and happens now in some of the so-called republics of Central and South America, the *de iure* sovereign

[1] 11 Henry VII, cap. 1.

virtually disappears, and nothing but the actual strength of each *de facto* sovereign, or pretender to sovereignty, is regarded. Some of these republics are so much accustomed to the suspension of *de iure* government by *de facto* disturbance, that they provide that when a rebellion is over the previously enacted constitution shall be deemed not to have lost its force[1]. It might be expected that when such a state of things has continued and become familiar, the conception of a legal sovereign would itself fade away and be extinguished. But political necessities and the example of other countries forbid this in the more civilized communities. It is so convenient to all parties to maintain the fabric of ordinary private law with the judicial and executive machinery required to support that fabric, that even when the person (or set of persons) who exercises Practical Sovereignty is frequently changed by revolutions, the substitution of one head for another is not deemed to affect the general machinery. Administration is held to go on *de iure*, and the new occupant of the supreme power steps at once into the legal position of his predecessor. In the Roman Empire of the first four centuries of our era, the office of Emperor remained with its recognized functions and powers, though the holder of the office was frequently changed by violent means, and seldom possessed what lawyers would call a good title. The individual man was a pure *de facto* sovereign, often with no legal right to the obedience of the subject, but Caesar Augustus remained

[1] Thus the Constitution of Guatemala directs: 'Esta Constitucion no perderá su fuerza y vigor auncuando por alguna rebelion se interrumpa su observancia.' I take this instance from the book of M. Ch. Borgeaud, *Établissement et Révision des Constitutions*, p. 236.

unchanged, and probably five-sixths of the population of the Empire did not know the personal name or the previous history of him whom they revered as Caesar Augustus. So the changes in the constitution of France between January, 1848, and February, 1871, in which there were three total and absolute ruptures of legal continuity by revolution, with two interregna under provisional governments, had little effect on the laws or the courts or the civil administration of France. The same thing happened during the dynastic wars of the fifteenth century in England. Thus even in disorderly times the idea of rule *de iure* is not lost among peoples that have once imbibed it. All through the English Civil War and Protectorate of the seventeenth century strenuous efforts were made by the Long Parliament and by Oliver Cromwell to make their government appear to be *de iure*, though the Restoration Parliament treated it as having been (on the whole) *de facto*. In most Central or South American republics, on the other hand, as among the Italian republics of the fourteenth century, the interferences of the *de facto* sovereign with the course of law and administration are so numerous that the very notion of *de iure* government loses its practical efficacy, and people simply submit to force, praising the ruler who least abuses his despotic power.

The action and reaction of power *de iure* and *de facto* upon one another might be illustrated by a diagram —a sort of political seismographic record—showing how the disturbance of either disturbs the other, and how the steadiness of the *de iure* needle or the frequent quiverings of the *de facto* needle indicate the stability or

instability of the institutions of a country. One may express the relations of the two somewhat as follows:—

When Sovereignty *de iure* attains its maximum of quiescence, Sovereignty *de facto* is usually also steady, and is, so to speak, hidden behind it.

When Sovereignty *de iure* is uncertain, Sovereignty *de facto* tends to be disturbed.

When Sovereignty *de facto* is stable, Sovereignty *de iure*, though it may have been lost for a time, reappears, and ultimately becomes stable.

When Sovereignty *de facto* is disturbed, Sovereignty *de iure* is threatened.

Or, more shortly, the slighter are the oscillations of each needle, the more do they tend to come together in that coincidental quiescence which is an index to the perfect order, though not otherwise to the excellence, of a government.

Let us try to sum up the propositions to which the foregoing inquiry has led us:—

The term Sovereignty is used in two senses, Legal Supremacy and Practical Mastery.

Legal Sovereignty exists in the sphere of Law: it belongs to him who can demand obedience as of Right.

Practical Sovereignty exists in the sphere of Fact: it is the power which receives and can by the strong arm enforce obedience.

The Legal Sovereign in any State is ascertained by determining the Person (or Body) to whom the law assigns in the last resort the right of issuing general rules or special orders, or of doing acts without incurring liability therefor.

The Practical Sovereign is ascertained by determining who is the Person (or Body) whose will in the last resort prevails (or in case of conflict, will be likely to prevail) against all other wills.

Legal Sovereignty does not depend upon the obedience actually rendered; for the law assumes obedience to be always enforceable. Obedience paid is not a note characterizing the Legal Sovereign, but a Postulate of his existence. That the Legal Sovereign does in fact exercise his rights under the influence of another person (or body) makes no difference. He is none the less a Legal Sovereign. A Mikado is Legal Sovereign though the Shogun may rule in his name. Thus Legal Sovereignty is Formal, not Material.

Legal Sovereignty is Divisible: *i. e.* different branches of it may be concurrently vested in different Persons (or Bodies), co-ordinate altogether (Pope and Emperor), or co-ordinate partially only (President and Congress), though acting in different spheres.

Practical Sovereignty seems indivisible, for by its definition it can belong to one Person (or Body) only, viz. that which is actually the strongest (though perhaps not known to be the strongest) in the State. But it may be so far divided that men obey one ruler in one sphere of action and another in another sphere. In the fourteenth century, for instance, all Christians obeyed the Pope in spiritual matters, their secular government in temporal, and this whether the latter was only *de facto* or also *de iure*. There might of

course be much dispute as to what were spiritual matters, but no one denied that in matters which were really spiritual the Church alone should be obeyed.

Legal Sovereignty may be Limited, *i. e.* the law of any given State may not have allotted to any one Person (or Body), or to all the Persons (or Bodies) taken together, who enjoys (or enjoy) supreme legislative (or executive) power, the right to legislate, or to issue special orders, on every subject whatever. That is to say, some subjects may be reserved to the whole People, or may be declared unsusceptible of being legislated on at all, even by the whole people. If there be a reservation to the people of an ultimate decision on all subjects, as for instance by way of constant Referendum, the people and not the legislature may be the true Legal Sovereign. But a right reserved to the people of qualified interference, or of altering the powers of the Legislature from time to time, does not of itself deprive the legislature of legal sovereignty.

Practical Sovereignty is, by definition, incapable of being limited (for Law has nothing to do with it), though the exercise of it by its possessor may be restrained by the fear of consequences.

Although Legal and Practical Sovereignty are distinct conceptions, belonging to different spheres, they are in so far related that—

Legal Authority is a potent factor in creating Practical Mastery.

Practical Mastery usually ripens, after a certain time, into Legal Authority.

Thus—

In an orderly State, the respect for Legal Sovereignty keeps questions of Practical Sovereignty in abeyance.

In a disorderly State, conflicts regarding Practical Sovereignty weaken and ultimately destroy the respect for Legal Sovereignty.

To which we may add, with a view to questions to be discussed presently—

Questions of the Moral Rights conferred and the Moral Duties imposed by Sovereignty, whether Legal or Practical, belong to a different province from that in which the determination of the nature of either kind of Sovereignty lies. Such questions are however in so far related to these two that—

Legal Sovereignty carries with it a *prima facie* moral claim to the obedience of all citizens;

Practical Sovereignty carries with it no further moral claim to obedience than such as arises from the fact that a useless resistance to superior physical force tends to breaches of the peace and to suffering which might be spared.

In both cases it may be the duty of the citizen, where some higher moral interest than that of avoiding breaches of the peace is involved, to resist either the Legal or the Practical Sovereign.

Let it be further noted that though one is obliged to speak of the Practical Sovereign as exerting a limitless power, and as some of those who have written on Sovereignty describe the Sovereign as being subject to no

restraint whatever, his sole will being absolutely dominant over all his subjects, there has never really existed in the world any person, or even any body of persons, enjoying this utterly uncontrolled power, with no external force to fear and nothing to regard except the gratification of mere volition. The most despotic monarch is bound to respect, and often to bow to, the general sentiment of his subjects. From some acts even a Sultan Hakim in Egypt or a Gian Galeazzo Visconti in Milan recoils, because he feels they might provoke an insurrection or bring about his own assassination. A popular majority (although also to some extent limited) is less sensitive, because individuals, nearly all of them obscure, have less to fear. In this sense a democracy, that is to say, the majority in a democracy, may be a more absolute sovereign than a monarch. But the majority in a democracy has fewer personal temptations to abuse power. It is moreover checked by the feeling that if it does so it may alienate its own more moderate section. Hence it becomes tyrannical only when it is swayed by violent passion, or when it is sharply divided into two sections between whom no moderate party is left.

V. Roman and Mediaeval Views of Sovereignty.

Let us now turn to consider the theory of Sovereignty which, started by Hobbes, reiterated by Jeremy Bentham, and set forth with dreary prolixity by John Austin, found much acceptance in England during the first three quarters of the present century, though it has latterly lost its former prestige. The modern form of Hobbes' doctrine (whose original form will

be presently stated and examined) is recommended by its apparent simplicity and completeness. But we shall find it to have the defects (1) of confounding two things essentially distinct, the sphere of law and the sphere of fact; (2) of ignoring history; and (3) of being inapplicable to the great majority of actual States, past or present. It can be brought into conformity with the facts only by an elaborate process, either of rejecting a large part of the facts, or else of torturing and twisting the conception itself. A rule which consists chiefly of exceptions is not a helpful rule. In the human sciences, such as sociology, economics, and politics, just as much as in chemistry or biology, a theory ought to arise out of the facts and be suggested by them, not to be imposed upon the facts as the product of some *a priori* views. If it needs endless explanations and qualifications in order to adapt it to the facts, it stands self-condemned, and darkens instead of illumining the student's mind.

Obviously however no such theory would have emerged or for so long commanded respect but for causes of considerable weight and permanence. Its origin therefore, and the sources of its influence, deserve to be carefully examined by the light which history supplies. And to explain its origin, one must digress a little from our proper theme, and go back to the fountain of modern legal ideas in the Roman law.

The Roman jurists themselves fell into no confusion between the rights of a legal sovereign and the powers of the actual or (so-called) 'political' sovereign, for they dealt with legal sovereignty only, and dealt with it, not as political philosophers, but simply as lawyers. Under

the Republic, legislative supremacy belonged to the people meeting in their *comitia*, while a certain control of the executive magistrates, springing from the right to advise, was practically allowed to the Senate. It may be argued that the people could have legally deprived the Senate of its executive powers, and those who hold this view may if they like hold that the Senate had not in technical strictness any sort of sovereignty even in executive matters[1].

For our present purpose the important point is the period of Justinian, because it was in the form into which he condensed it that Roman law affected political speculation after the twelfth century. Now Justinian's *Institutes* and *Digest* still talk of the Roman people as possessing of right supreme legislative authority, though in point of fact they had not exercised it for more than five centuries. And in recognizing the Emperor as the person who actually possesses legislative power, they deduce his rights from a delegation by the people of their rights, and perhaps, if we are to take their words strictly, a delegation not in perpetuity to the imperial office, but to each individual Emperor in succession. Like the English of the seventeenth century, the Romans were determined worshippers of legality, and sought carefully to obliterate the traces of revolution, so they continued for a long time to treat the arrangement by which supreme authority was vested in a person as the holder of certain magistracies as a provisional and temporary arrangement[2].

[1] As to the Senate's right of legislation, see Essay XIV, p. 304.

[2] At one moment, after the death of Caligula, it was proposed in the Senate to set to work anew the republican constitution, which had never been formally superseded.

It need hardly be said that centuries before Justinian's day this doctrine of delegation, for a time formally expressed in the so-called *lex de imperio* passed at the accession of each new Emperor, had become a mere antiquarian curiosity, no more representing the actual facts than the language of the Anglican liturgy regarding the Crown represents the actual condition to-day of the royal prerogative in England. Justinian and his successors had in the fullest sense of the word complete, unlimited, and exclusive legal sovereignty; and the people of old Rome, who are talked of in the *Digest*, by the lawyers of the second and third centuries, as the source of the Emperor's powers, were not in A. D. 533, except in a vague *de iure* sense, actual subjects of Justinian, being in fact ruled by the Ostrogothic king Athalarich (grandson of the great Theodorich). But it is noteworthy that the lawyers also assigned to the people as a whole, entirely apart from any political organization in any assembly, the right of making law by creating and following a custom, together with that of repealing a customary law by ceasing to observe it, *i. e.* by desuetude, and that they justify the existence of such a right by comparing it with that which the people exercise by voting in an assembly. 'What difference,' says Julian, writing under Hadrian, 'does it make whether the people declares its will by voting or by its practice and acts, seeing that the laws themselves bind us only because they have been approved by the people[1]?'

It need hardly be observed that if Tribonian and the other commissioners employed by Justinian to

[1] *Dig.* i. 3. 32, § 1 (cf. *Inst.* i. 2. 11). In the *Institutes* of Justinian the Emperor's legislative power, though complete, is still grounded on a delegation formerly made by the people.

condense and arrange the old law had, instead of inserting in their compilation sentences written three or four centuries before their own time[1], taken it upon themselves to state the doctrine of legislative sovereignty as it existed in their own time, they would not have used the language of the old jurists, language which even in the time of those jurists represented theory rather than fact, just as Blackstone's language about the right of the Crown to 'veto' legislation in England represents the practice of a period that had ended sixty years before. But those who in the Middle Ages studied the texts of the Roman law cared little and knew less about Roman history, so that the republican doctrine of popular sovereignty which they found in the *Digest* may have had far more authority in their eyes than it had in those of the contemporaries of Tribonian, to whom it was merely a pretty antiquarian fiction.

These were the legal notions of Sovereignty with which the modern world started—the sharply outlined Sovereignty of an autocratic Emperor, and the shadowy, suspended, yet in a sense concurrent or at least resumable, Sovereignty of the People, expressed partly in the recognition of their right to delegate legislation to the monarch, partly in their continued exercise of legislation by Custom.

But there was also another influence, born while the autocracy of the early Emperors was passing from the stage of power *de facto* into that of sovereignty *de iure*,

[1] They frequently altered the language of the old jurists to make it suit their own time, so it is the more noteworthy that the ancient terms have in this instance not been altered.

which told with no less force upon the minds of men during the Middle Ages, and also in the later days when a freer philosophy began to attack the problems of political science. While to the educated classes in old Rome the Emperor's legal Sovereignty bore the guise of a devolution from that of the People, his provincial subjects, who knew little or nothing of these legal theories, regarded it as the direct and natural consequence of Conquest. By the general, probably the universal, law of antiquity, capture in war made the captured person a slave *de iure*. Much more then does conquest carry the right of legal command. Conquest is the most direct and emphatic assertion of *de facto* supremacy, and as the *de facto* power of the Romans covered nearly the whole of the civilized world, maintained itself without difficulty, and acted on fixed principles in a regular way, it speedily passed into Legal Right, a right not unwillingly recognized by those to whom Roman power meant Roman peace. This idea is happily expressed by Virgil in the line applied to Augustus—

> 'Victorque volentes
> Per populos dat iura,'

while the suggestion of a divine power encircling the irresistible conqueror, an idea always familiar to the East, appears in the words

> 'viamque adfectat Olympo,'

which complete the passage.

The feeling that the power actually supreme has received divine sanction by being permitted to prevail, that it has thereby become rightful, and that it has, because it is rightful, a claim to obedience, is clearly

put in writings which were destined, more than any others, to rule the minds of men for many centuries to come.

'Let every soul be subject unto the higher powers. For there is no power but of (=from) God: the powers that be are ordained of God. Whosoever therefore resisteth the power, resisteth the ordinance of God: and they that resist shall receive to themselves damnation (*lit.* judgement). For rulers are not a terror to good works, but to the evil. Wilt thou then not be afraid of the power? do that which is good, and thou shalt have praise of the same; for he is the minister of God to thee for good. But if thou do that which is evil, be afraid; for he beareth not the sword in vain: for he is the minister of God, a revenger to execute wrath upon him that doeth evil' (Rom. xiii. 1–5).

'Submit yourselves to every ordinance of man for the Lord's sake; whether it be to the Emperor, as supreme, or unto Governors, as unto them that are sent by him for the punishment of evildoers, and for the praise of them that do well. For so is the will of God, that with well-doing ye may put to silence (*lit.* bridle) the ignorance of foolish men' (1 Pet. ii. 13–15).

Here the authority of the Emperor is not only recognized as being *de iure* because it exists and is irresistible, but is deemed, because it exists, to have divine sanction, and thus a religious claim on the obedience of the Christian, while at the same time, in the reference to the fact that the power of the magistrate is exercised, and is given by God that it be exercised, for good, there is contained the germ of the doctrine that the Power may be disobeyed (? resisted) when he acts for evil; as St. Peter himself is related to have said, 'We ought to obey God rather than men' (Acts v. 29).

These and other similar dicta in the New Testament are not only evidence of the sentiments of Roman provincials under the earlier Empire, but are also the doctrines, delivered under the highest authority, from which mediaeval thought starts. How they are worked

out may be seen by examining the reasonings of Dante in his *De Monarchia*, or, still better, the political theories of St. Thomas Aquinas. From the fifth to the sixteenth century whoever asked what was the source of legal Sovereignty, and what the moral claim of the Sovereign to the obedience of subjects, would have been answered that God had appointed certain powers to govern the world, and that it would be a sin to resist His ordinance. From the eleventh century onwards it was admitted in Western Christendom, though less cordially in France, Spain, or England than in Italy and Germany, that there were two Legal Sovereigns, and according to the view more generally held, each was *de iure* absolute, the Pope in spiritual, the Emperor in temporal matters. Both Pope and Emperor were above all positive secular Law, but subject to the Law of Nature and the Law of God, these being virtually the same[1]. The power of the Pope came immediately from God, through the institution of Peter as chief bishop. The Emperor's power, almost equally incontestable, had a double origin. According to the New Testament, that power came from God; according to the Roman law, it had been delegated by the people, the ultimate source of civil authority. St. Thomas Aquinas recognizes sovereignty as originally and primarily vested in the people, hardly less explicitly than does the Declaration of Independence. These two views were capable of being combined, and the theory of delegation did not really reduce the Emperor's authority, for there was no actual people capable of recalling the rights

[1] See as to the distinction between that part of the Law of God which is also the Law of Nature and other parts thereof, Essay XI, p. 15 8

delegated[1]. But there was also another doctrine, according to which the Emperor drew his rights from the Pope, who crowned him, and who as spiritual Sovereign exercised a higher jurisdiction, being responsible for the welfare of the Emperor's soul. After the days of Pope Gregory the Ninth and the Emperor Frederick the Second, the doctrine held by nearly all churchmen of the inferiority of imperial to papal authority damaged the Emperor's position. It suffered still more because after those days the Emperor did not rule *de facto* outside Germany, and not always even within it. Most jurists, however, continued to hold that the rights of the successor of Augustus still existed everywhere *de iure*, though it was admitted that they consisted only in a sort of over-lordship, which, always ineffective in practice, became constantly more evanescent in theory. Controversy continued to rage over the limits to be drawn between them and the parallel sovereignty of the successor of Peter; and this controversy produced in the fourteenth century an anti-ecclesiastical movement represented in literature by such men as Marsilius of Padua and the English Franciscan William Occam. In those writers one finds the germs of the doctrine, afterwards famous, which refers the origin of the State to the free consent of individual men.

In these mediaeval controversies it was assumed throughout and on all sides that power *de facto* must

[1] Nevertheless the followers of Arnold of Brescia in Rome attempted to claim for the Roman people the right of choosing the Emperor; while there were others who argued that the true representatives of the old Roman people were to be found in the whole Christian community of the Empire.

follow Sovereignty *de iure.* But this Sovereignty, although above positive law, being indeed the source of such law, was deemed to be held subject to the Law of Nature, since it is a trust from God. However, as it became more and more clear that the Emperor was ceasing to be an effective ruler, the temporal sovereignty of local kings was fully admitted, and their rights were based partly on the providence of God, which had allowed them *de facto* power, partly on the feudal relations of lord and vassal, formed by reciprocal promises of protection on one side, of loyal support on the other.

VI. Modern Theories of Sovereignty.

The sixteenth century brought with it four momentous changes, any one of which would have alone been sufficient to shake the existing fabric of thought and belief:—

The Emperor died out as universal Sovereign, and became thenceforth little more than a German monarch, with a titular precedence over other princes.

The Pope was gravely wounded by a revolt which ended by withdrawing half Europe from his sway.

The feudal structure of society began to crumble away, and therewith the power of the Crown in each country grew.

A new spirit of inquiry, sceptical in its tendencies and no longer deferential to authority, sprang up in Western and Southern Europe.

Thus that traditional doctrine regarding the basis of authority which had been sufficient for the Middle Ages faded into dimness. Morals began to be separated from

theology, and the outlines of political science to emerge from feudal law. Men asked what was the basis of a king's claim to be obeyed. Did Might give Right? or did Right give Might? What was Right itself? Were there any, and if so, what, moral or religious limitations on the powers of a monarch? and if so, did his transgression of these limitations justify rebellion against him? These were not purely speculative questions, because the wars of religion, which brought bodies of subjects into collision with monarchs of a faith opposed to their own, and the Pope into collision with Protestant monarchs, raised issues of principle that were momentous, not merely because they troubled conscientious minds, but also because men felt the need of guidance and sought for it in some belief which could stimulate and inspire their action. Kings were everywhere extending their functions and assuming, more than ever before, the work of legislators, while at the same time subjects found that new reasons had arisen for resisting kings. The old theory which deduced the rights of kings from the grant of authority divinely made to Peter and to Caesar was outworn. A new explanation of the nature of political society was needed; and from that time onward new theories of State power began at intervals to appear.

The particular form taken by the problems which these theories attempted to solve was determined by the conditions of a time in which the coherence of nations and states was threatened on the one hand by religious discord, and on the other by the claims of local magnates as against the Crown. Hence the aim of thinkers was to discover something which would

secure the unity of the State. They asked, What is it that holds the State together? Must there not be some supreme Force to overcome the various forces that in each State make for division? Where is that Force to be found? Whence comes its title to rule? In what persons should it be vested? Can it be, or ought it to be, checked? These thinkers did not approach such questions by an induction from the facts of actual states, as we should do, but were guided partly by the dogmas of law and theology which the Middle Ages had bequeathed to them, partly by abstract theories which their advocacy of kingly authority, or papal claims, or popular rights, suggested. And this explains why the Roman Catholic writers, who might have been expected to maintain the absolute sovereignty of kings for the purpose of crushing out heresy, are often found defending the rights of the people, and arguing for the right to revolt against and depose a heretical monarch, such as Henry the Eighth, or Elizabeth, who had fallen away from obedience to that ecclesiastical authority whose rights came from the grant to St. Peter.

The first theory, or at least the first which exerted wide influence, was that of Bodin, a French jurist, whose book, in its earliest form, was published in 1576. In his view Sovereignty or *Maiestas* is the highest power in a State, which is subject to no laws, but is itself the maker and master of them. It may reside either in one person, which is the best and normal form, or in a number of persons. But in either case it is above all law, incapable of limitation or division, and having an absolute claim to the obedience of all its

subjects, irrespective of the justice or policy of its acts. Hence Bodin rejects all so-called limited monarchies and restricted governments; and while he calls the Romano-Germanic Empire of his day not a monarchy but an aristocracy, he finds in the French monarchy a pure autocracy of the proper type. Nevertheless even Bodin admits that, in some sort of vague way, the Sovereign is subject to the Law of God and the Law of Nature, and conceives that he is therefore bound to perform any contracts he may make, and to respect the rights of property and of personal freedom.

The boldest and most logically complete counter theory to that of Bodin came from a younger contemporary of his, the Calvinist Iohannes Althusius (John Althus or Althaus), who was born in 1557, and died in 1638. Calvin himself, and most theologians of his school, had returned to the ancient theocratic view that civil power is derived from God, dwelling especially on Romans viii. 1. Althusius, however, bases the government of the State on a contract between the people and the ruler, and proceeds to assert the rights of the former, as the ultimate source of all power and the only true and permanent depositary of sovereignty, to depose the ruler and resume the delegated power when he has violated his duties and transgressed the measure of authority granted to him[1].

Nearly a century later than Bodin a scheme, similar to his, but more thorough-going was propounded by Thomas Hobbes of Malmesbury. This scheme, con-

[1] A full and instructive account of this writer's theories is contained in the admirable book of Professor Otto Gierke, *Johannes Althusius und die Entwickelung der naturrechtlichen Staatstheorien*, which is a repertory of information regarding mediaeval and post-mediaeval doctrines of the State.

tained in the book entitled *Leviathan* (and in the treatise *De Cive*), cannot be appreciated without remembering the time when the book was written, and the circumstances to which it was addressed. So directly does it contemplate them that it may almost be called a political pamphlet—gigantic, but a pamphlet. The Civil War was raging. The supreme power in England was disputed between the King and the House of Commons. Ecclesiastics, both Episcopalian and Presbyterian, had been prominent in claiming authority for their religious views, and the nation was splitting up partly on political, partly on ecclesiastical lines. Hobbes was equally hostile to all ecclesiastics—to the Anglican theory of divine right, and to the Presbyterian theory of a covenant of the people with God. Yet he did not like to base society upon mere force, because in that he could find no foundation for justice or moral obligation. Hence he clung to the notion of a contract. But it was a new kind of contract, which, not being made with the Sovereign, and being itself irrevocable, can give no ground for insurrection. Seeing disunion and confusion all around him, and men divided by the pretensions of jarring authorities, Hobbes conceived that the three things needful were (1) to find a basis for power which should be permanent and inexpugnable, (2) to make power one and indivisible, and (3) to make it absolute and limitless. Perceiving the flaws in the theory, as old (in a rude form) as the thirteenth century, which founded government on a compact between Sovereign and People, he bases his Sovereignty on a covenant of each member of the community with every other member to surrender all their several rights and

powers into the hands of one Person (or Body), who thereby becomes Sovereign, but as against whom, seeing that he is not himself a party to the compact, it cannot be annulled by those who made it, because they made it not with him but with one another. His authority is therefore permanent and unlimited; nor is he, like Bodin's Sovereign, bound by any pre-existing institutions. As the people have, by anticipation, ratified all his acts, everything that he does, however harsh, is just, and gives them no ground for complaint. Indeed his power is justified by the Law of Nature, because the three fundamental Laws of Nature are (1) that all men should endeavour to secure peace, (2) that an individual man should renounce his original rights when the majority will to do so, (3) that every man should observe the covenants which have been made by him, including of course this supreme covenant.

Though Hobbes is chiefly concerned with establishing his Sovereign *de iure*, and making his *de iure* autocracy complete, he does also conceive him as enjoying complete *de facto* power. He could indeed do no otherwise, for the Sovereign he describes is not an actual Sovereign. Hobbes does not profess to be analysing existing States, or explaining existing institutions. He is presenting an ideal State, and arguing that mankind (and in particular England) will never be rid of their present troubles until this Absolute Sovereign of his has been installed with a *de iure* title so fully recognized that *de facto* power will follow. The Civil War had raised grave questions in the *de iure* sphere, and it was natural to believe that, were those questions out of the way, Practical Mastery would accompany

Legal Sovereignty. Nor was it so strange as some may fancy to-day, that a philosopher should doubt the possibility of securing peace and order under a monarch limited by law, or indeed under any government consisting of elements so antagonistic as Crown, Lords, and Commons, were then showing themselves to be. Hobbes is a thinker of singular clearness and precision. He is cogent in argument, and adheres to his main propositions with a consistency greater than Bodin had shown. He sometimes seems more disputatious than philosophical. But the reader who would judge him fairly must bear in mind that he is writing with a view to the circumstances of his own time, delivering his blows now at the Solemn League and Covenant, now at the Levellers, now at the parliamentary legalists[1].

Towards the end of the following century Bentham revived Hobbes's doctrine of Sovereignty, taking it over, however, not so much as either an ideal conception, or a suggestion pointing a way out of civil war, but rather as embodying the characteristic features of a normal State. Bentham was a man of extraordinary ingenuity, fertility, and boldness, but he was sometimes heedless; he lived before the days of what we call the historical method, and he had a hearty contempt, if not for history, yet for the legal institutions it had produced, which indeed he thought mostly wrong. Accordingly, neither the absolutistic proclivities of Hobbes, nor the inapplicability of the Hobbesian theory to the majority of existing governments, deterred him from adopting a doctrine

[1] Hobbes goes so far as to wish to extinguish the right of private judgement, and deems it part of the duty of the Sovereign to prescribe opinions to his subjects, and in particular to inculcate the true doctrine of Sovereignty.

which pleased him by its subjection of vague morality to precise legality, and by its vigorous assertion of the legal omnipotence of an authority which a reformer of his drastic type needed for the accomplishment of his purposes. Bentham therefore had practical reasons for his adhesion to the scheme of Hobbes, far removed as he was from Hobbes's notions of the anarchic State of Nature and the original covenant. But John Austin, Bentham's disciple, had less excuse for the use he made of Hobbes's speculations. It has been doubted whether he understood Hobbes. However this may be, he would seem to have misconceived the position in which Hobbes stood, and to have taken the latter's argument for an absolute Sovereign as the best way of constituting authority in a State, as a philosophical analysis of the nature and essence of authority in a normal State. Hobbes was the advocate of a scheme intended to cure actual political evils. Bentham was a practical reformer of the law, which certainly needed reform. Austin, however, wrote as a jurist, professing to describe the normal and typical State. He was therefore bound to have some regard to facts, and to present a theory of the State which would have explained and correlated the facts, putting them in their natural and true connexion. Instead of this he has given us a theory, which is so far from being that of the normal modern State, that it is applicable to only two kinds of States, those with an omnipotent legislature, of which the United Kingdom and the late South African Republic are almost the only examples, and those with an omnipotent monarch, of which Russia and Montenegro are perhaps the only instances among civilized countries. In nearly

all free countries, except the United Kingdom, legislatures are now restrained by Rigid constitutions, so that there is no Sovereign answering the Austinian definition. In all Muhamadan countries the monarch is legally, as well as practically, restrained by his inability to change the Sacred Law; so that, even in those countries where despotism seems at first sight enthroned, the definition will not work. Even in the application of his own theory to the United Kingdom, Austin falls into an error which betrays its radical unsoundness. Though he defines a Sovereign as 'the determinate superior who receives habitual obedience from the bulk of a given society'—a definition which belongs to the *de facto* sphere and suits a *de facto* sovereign, but does not touch the *de iure* sovereign, who may have no means of enforcing obedience—still it is plain that his eye is chiefly fixed on law and legal right, and that he assumes that to the person who enjoys legal right obedience will in fact be rendered. A Greek tyrant, such as Agathocles at Syracuse, received habitual obedience from the bulk of the Syracusans; but he was clearly not Sovereign *de iure*[1]. But Austin, when he comes to the United Kingdom, finds his Sovereign not in Parliament, that is to say, in the Great Council of the Nation consisting of the Crown, the House of Lords, and the House of Commons, but in the two former parts of Parliament, along with—not the House of Commons, but—the qualified electors of the nation! This view is opposed not only to law, but also to history,

[1] Austin so far feels the difficulty of fitting his theory to the case of tyrannies as to imply that it is to be applied in settled States only. But this is to admit *pro tanto* the inadequacy of the theory.

which shows that the Great Council of the Nation has never been deemed to consist of or include 'trustees' (as Austin calls them) for the Nation, but to be the Nation itself, assembled for national purposes, its members being either in their own right or, as representatives, plenipotentiary, and enjoying, in contemplation of Law—just as much as did the primitive Folk Mot from which Parliament has gradually developed—the plenitude of the nation's powers. It is moreover opposed to the facts of the case, because the electors of the country do not legislate, and have no legal means of legislating. Their consent is not required to the validity of the most revolutionary Act of Parliament, as the consent of a majority of the Swiss electors and Cantons is required to a change in the Constitution of the Helvetic Confederation. A statute might conceivably be passed, of which five-sixths of the electors notoriously disapproved, and yet it would be just as good a statute as one against which no voice had been raised. Parliament may even give itself a competence which the electors never contemplated, as it did when it passed the Septennial Act.

Some of those who have admitted that Bentham's and Austin's theory is historically indefensible, have sought to excuse its faults on the ground that we must test theories, not by the facts of nascent communities, but by those which the fully-grown modern State presents. But it is in truth quite as inapplicable to most of these modern States as it is to ruder societies. Take, for instance, the Austro-Hungarian monarchy. Where, on Austin's principles, does Sovereignty reside in this dual State? The ultimate legislative authority, that is to say,

the authority which receives commands from no other authority, but gives them to others, is to be found in the so-called Delegations, each composed of thirty members of the Hungarian Parliament, and as many of the Austrian Reichsrath. But these are themselves chosen by the two subordinate Parliaments, and must therefore be subordinate to them, if the British House of Commons is subordinate to the British Electorate. Moreover, the Delegations can legislate on a few prescribed subjects only, all other subjects belonging either to the two Parliaments respectively, or, in the case of Austria, to the legislatures of the several provinces (*Kronländer*) which make up the Austrian federation, and the Delegations derive their authority from laws passed by the Austrian Reichsrath and by the Hungarian Parliament. Where then does Sovereignty reside? Is it in the authorities which made the Constitution? The Austrian half of the Monarchy received its Constitution from five Statutes passed in 1867, which can be changed only by a two-thirds majority in both Houses of the Reichsrath; the Hungarian half from the laws of 1848, which the Emperor King agreed to bring into force in 1867, and which apparently the Parliament, with the consent of the Monarch, can amend. There is evidently no hope of finding any one Sovereign, in the sense of the Austinian definition, for this great and powerful State[1]. Or take the United States, whose Constitution has become a sort of model for many more recent con-

[1] An Austinian might perhaps say that the Austro-Hungarian monarchy consists of two separate States, with no single Sovereign. But it is unquestionably one State in the eye of international law, and the Delegations have some powers incompatible with the existence of an Austinian sovereign in either half of the monarchy.

federations. Austin places Sovereignty in the ultimate power which can alter the Constitution, viz. the people (or peoples)—I use both phrases to avoid controversy—of the States. But in the first place, the people (or peoples) of the States are not a body habitually acting. They did not act at all from 1810 till 1867. They have not acted since 1870. It was because it was impossible to get them to act that the question of slavery proved insoluble by constitutional means. Is there not something unreal and artificial in ascribing Sovereignty to a body which is almost always in abeyance? Moreover, the majorities by which the Constitution can legally be amended are very rarely attainable; and when they are not attainable, there would therefore seem to be no Sovereign at all. And as regards one point—the equal representation of the States in the Senate, even a three-fourths majority of States can do nothing against the will of the State or States proposed to be affected, a further absurd result of the doctrine. One might pursue the argument by examining the case of other federations, such as the Germanic Empire, both the old one and the new one, and show to what strange results these Austinian principles would lead. But the above illustrations may suffice to indicate the extreme artificiality of the doctrine that Sovereignty cannot be divided, as earlier illustrations have shown the inconveniences of confounding purely legal supremacy with actual mastery.

Austin denies that there is any difference between a government *de iure* and one *de facto*, because Sovereignty *de iure* must itself issue from the Sovereign himself, and the same person cannot be both creature

and creator. If this means that the British Parliament and the Czar, being legally omnipotent cannot be legally controlled, it is an obvious, but infertile remark, and it conceals the really material fact that both authorities are obeyed because the long-settled custom or law of the country has formed the habit of obeying and the notion that it is a duty to obey. If it means that every Sovereign *de facto* is also Sovereign *de iure*, or the converse, it is untrue. Hobbes had a reason for bringing in obedience as the test of the Sovereign. Bentham and Austin have not this reason, for they are in the sphere of law, and law is not concerned with obedience as a fact. The right of a Sovereign to be obeyed does not to the lawyer rest on Force, for he assumes that wherever law exists it will make itself prevail.

VII. Questions regarding Sovereignty liable to be confounded.

In most of the speculations of the school which traces its origin to Hobbes, and indeed in some of Hobbes' critics also, there would seem to be a confusion of two or more of six different things, viz. :—

1. The conception and definition of legal supremacy.
2. The conception of practical mastery.
3. The historical question as to the origin of the notion of Legal Right.
4. The historical question as to the origin of organized political communities in general, and of the habit of obedience therein.
5. The moral obligation on the members of a State

to render obedience to the authorities within it, whether those authorities rule by law or by force.

6. The moral obligations which bind the holder of power, whether *de iure* or *de facto*.

In the hands of Bentham, whom Austin follows, the two last-mentioned confusions, which exercised men's minds in the days of Hobbes and Locke, have disappeared. Bentham has seen, and has stated with admirable clearness, the line which divides the province of morality from that of legal obligation.

But he has mixed up the other four, and especially the first two—for it is rather by implication than by express words that his writings cover the questions of the historical origin of Right and of the State—in a way that has clouded the mind of many a student since his time, and has in particular produced two capital errors, that of regarding Law as primarily and normally a command, which it certainly was not at first and is only partially now, and that of denying the legal quality of Customary Law, which has been in all countries the most fertile, and is still in some practically the only source of law. This confusion seems to have been due mainly to two causes. One is the omission of the followers of Hobbes to pay any regard to the history of States and Governments, and to perceive that in many stages of their growth the definitions which may suit a normal modern State are quite inapplicable. The other is the attempt to find concise and summary definitions and descriptions which will suit all modern States generally, whatever their diversities from one another, or (to put the same thing in a different form) the habit of arbitrarily assuming one

kind of modern State to be the normal State, even though the trend of recent tendency may be away from that type. The remark of Bacon, that men are prone to assume a greater uniformity in Nature than in fact exists, and to conceal real distinctions under identical nomenclature, finds an application in the moral and political sciences as well as in the sciences we call physical. This besetting sin of those who frame logical classifications upon the basis of abstract notions has led the so-called Analytic School of jurists sometimes to ignore the most material facts, sometimes to twist their definitions into a sense far removed from the natural meaning of the words they use.

The truth seems to be that the difficulties which have been supposed to surround the subject of Sovereignty are largely factitious difficulties, and spring from the attempts made to answer questions essentially different by the same terms. Had the qualifying terms *de iure* or *de facto* been added every time the word 'Sovereignty' was used, most of these difficulties would have disappeared. If we take the six questions just stated, and examine each by itself, there will be nowadays no great conflict of opinion as to the answer which each ought to receive.

Questions 1 and 2 have been already dealt with. When the qualification *de iure* or *de facto*, as the case may be, is in each case added, there need be no more mystery about either of them.

As regards 3 and 4, *i.e.* the origin of political power, whether *de facto* or *de iure*, the reply of history is unequivocal. There never was and never could have been any social contract in the sense either of Hobbes

or of Rousseau or of any of the other philosophers who have discovered in such a fact the foundation of organized society. Political communities, as every one will now admit, grew up of themselves under the influence of the needs of common defence, of religious belief, of habit, of the aggregative and imitative instincts of mankind. Law grew out of custom, and showed itself first, in most races, in the form of rules for the settlement of disputes, whether regarding property or regarding the compensation to be made for murder or other personal injury. It cannot be said that (as a general rule) authority based on physical force, the form in which Sovereignty *de facto* is commonly supposed to have begun, preceded authority *de iure*, for the two have usually grown up together, custom having in it an element of fear and an element of moral deference; and in this growth physical force has played no such predominant part as the school of Hobbes and Austin assign to it. Just as in the case of each individual man the most important, if not the largest part of his knowledge is that which he acquired in the semi-conscious years of childhood, so the chief part of the work of forming political societies was done by tribes and small city communities before they began to be conscious that they were forming institutions under which to live: and the leading conceptions of law and procedure were definite and potent before the beginnings of that direct legislation by a Sovereign which is now represented as the normal action of an organized political body. Nor is the power of the community as a whole, apart from its titular Sovereign or its representative organs, extinct to-day. It survives in the vague but

irresistible force of public opinion which controls all those organs.

When we come to the two last of the above questions (5 and 6) we find that a sharp distinction between Legal Sovereignty and Practical Mastery makes it easier to solve the problems they raise. Obedience to a ruler who is Sovereign only *de facto* and not also *de iure* is not now deemed a duty, unless the ruler *de iure* be powerless, or cannot be ascertained, in which cases it may be for the general good that the actual holder of power, even unlawfully obtained, should be supported as against anarchy or the prospect of civil war. But to our minds power *de facto*, apart from legal sanction, carries no title to respect. When it is abused, the good citizen not only may but ought to resist it.

With the Sovereign *de iure* the case is different. He has a *prima facie* claim to obedience, which can be rebutted or disregarded only in one of three events, (*a*) if he has lost *de facto* power, and is therefore unable to perform a Sovereign's duties, (*b*) if he has, in a State where his powers are limited, himself so gravely transgressed the constitution or laws as either legally or morally to forfeit his Sovereignty, (*c*) if in a State where his powers are not limited by the Constitution he has so abused his legal power as to become in fact a Tyrant, a foe to the objects of peace, security, and justice, for which government exists. In each of these cases it would be now generally held that the citizen is absolved from his allegiance, and that the sacred right of insurrection which the French of the Revolution and their friend Jefferson so highly prized must come into play. In case (*b*) the proper course would seem to be to resist

the *de iure* Sovereign by constitutional means, so far as they will go, and only in the last resort by force. If his transgressions have gone so far as to work forfeiture of his legal rights, he is of course no longer Sovereign *de iure.* In case (*c*), where no constitutional remedy exists, the formerly *de iure* ruler, since he has made himself a mere Tyrant or ruler against law, has created a state of war between himself and the citizens, and opposition to him becomes (as in the case of the mere *de facto* tyrant) a duty which is of stronger or weaker obligation according to the greater or less enormity of his offences, and the greater or less prospect of success in such opposition.

As respects the moral restraints by which the Sovereign, whether *de facto* or *de iure*, ought to hold himself bound, few will now dispute that they are substantially the same as those which bind an individual man in the ordinary relations of human life. Each must use his power in accordance with the general principles of justice and honour, regarding actual power as a trust from Divine Providence, and legal power as a trust from the community also. Only in a single point would it seem that there may be a difference, though one whose limits are difficult to fix in practice, between the moral duty of a Sovereign and that of an individual good citizen. Both are equally bound to strict justice, strict good faith, strict avoidance of cruelty, or even unnecessary harshness. But while the individual ought often to be not merely just but also generous, since it is only his own resources which generosity will impair, it is suggested that the Sovereign has no right to be generous out of the resources of the community

for which he is only a trustee. Similarly, while the good man may risk his own life to save the lives of others, the ruler must not risk the life of the community, because he has not been entrusted with any such power. To this it has been answered that the Sovereign is entitled to assume that the community ought to desire and will desire that its powers should be exercised in the best and highest spirit for the good of its members and of the world, and that he may upon this assumption do everything which a high-minded community would do were it consulted. The question, though seldom a practical one, is both interesting and difficult, for even if the analogy of trusteeship be admitted, there is room for much controversy as to the application of the principle in each particular case.

Some few publicists have argued that the Sovereign Power in a State is entirely discharged from all moral obligations when it is a question of preserving the existence of the State itself, and that violence, injustice, and bad faith then become legitimate expedients. In reply to such a detestable doctrine, it is enough to observe (first) that as the Sovereign would be himself the judge of what does involve the life of the State, he would be sure to abuse his freedom from moral ties in cases where the supposed justification did not really arise, and that thus all confidence of one nation in the good faith of another would be destroyed, and (secondly) that the argument must go so far as to put the claim of a State to preserve its collective existence higher than that of the individual to preserve himself from death, for no one will contend that an individual is justified in killing another man

(except of course in self-defence) or bringing a false charge against him, for the sake of saving his own life.

This question need not be pursued, because it lies rather outside the particular subject with which we are here concerned. But a few words may fitly be said regarding the bearing of the distinction between that which exists *de iure* and that which exists *de facto* on the questions that have arisen regarding Sovereignty in the international sphere.

VIII. Sovereignty in International Relations.

In that sphere there is no Law, in the strict modern sense, because no superior authority capable of adjudicating on disputes and enforcing rules, and therefore we cannot speak of the Sovereignty of one State over another State in the same sense in which a Person or Body within a State may be called Legally Supreme over the subjects. Nevertheless, where some legal tie has been created between two or more States, placing one in a lower position, we may say that inferiority exists *de iure*, while if there is merely an actual and continuing disposition of the weaker one to comply with the wishes of the stronger, there is inferiority *de facto*. Where the laws made by the legislative authority of one State directly bind the subjects of another State, the latter State cannot be called in any sense Sovereign. But between this case and that of absolute independence there are several grades of what may be called semi-Sovereignty, or (perhaps more correctly) imperfect Sovereignty. The

dependent State, though not amenable to the laws or courts of the superior one, may have no right to hold diplomatic relations with other States, or may, though entitled to send and receive envoys, have bound itself by a treaty with the superior State to submit for the approval of the latter any treaty it may conclude. Or again, it may have formally accepted the protection of the superior State, or have undertaken to receive its executive head from the latter, or to pay tribute to the latter. In all such cases the tie duly formed between the superior and inferior State, and notified to other States, is a fact of high diplomatic moment in determining the international status of the inferior State. Other States are bound by international usage to take note of the fact, and for one of them to attempt to send an ambassador to, or make a treaty with, an inferior State which had bound itself to a superior State in the way above indicated, would constitute a grave breach of comity—would be treated as what diplomatists call 'an unfriendly act.' Although, therefore, there is no Law, in the strict sense of the word, binding these inferior States, but only a Contract, still they may appropriately be said to be *de iure* dependent, or imperfectly sovereign. The world is full of them. There are a great many in India, bound to the British Crown by engagements which make them more or less subject to British control. Rumania and Servia were formerly in this position. There is one left in South-Eastern Europe, Bulgaria, although the tie binding it to the Turkish Sultan is wearing very thin[1].

[1] The position of Bosnia, occupied by Austria but not yet formally severed from the Ottoman Empire, is somewhat different. It may be com-

Bulgaria is not precluded from sending envoys and making treaties. There is one in North Africa—Tunis—which is now, in all but name and legal intendment, a province of France. Another African case, that of the late South African Republic, which, though it could accredit and receive envoys, was liable to have any treaty made by it (except with its neighbour republic) disapproved by Great Britain, has given rise to much controversy. Probably it should not have been called either an internationally Sovereign State, or a Dependent State, but rather a State dependent for one particular purpose and independent for others. The position of Egypt—which is *de iure* part of the Ottoman Empire for some purposes, is also *de iure* (for certain other purposes) under the control of six European Powers, and is *de facto* under the control of one of those six—is a very peculiar one. The varieties of relation in which one State may legally stand to another are indeed endless, and elude any broad classification.

Quite different from these cases are those in which a State, though practically dependent on another State, has contracted no public engagement which affects her theoretical independence. In such cases, third parties (*i. e.* States) are not *prima facie* bound (by international usage and comity) to pay any regard to the fact that the inferior State is *de facto* dependent. They may properly treat it as being completely Sovereign. But just as there are some cases in which a *de facto* Sovereign becomes morally entitled to

pared with that of Lothian in the hands of the king of Scots about the end of the tenth century, though in that case there may have been a quasi-feudal relation.

obedience from the citizens of a community, so there are some extreme cases in which a State, while technically independent, is notoriously so much *de facto* under the protection and control of a stronger State that it would be improper for third parties to ignore the actual relation. England (strictly speaking) has no legal control over Afghanistan or Nepal, and had none over independent Burma down to 1885, but Burma was annexed because it toyed with France, and any negotiations by a third power with Afghanistan or Nepal would be resented by England. Persia may possibly sink into a similar position as regards Russia.

IX. Sovereignty in a Federation.

One peculiar case remains to be mentioned in which theoretical views of the nature of Sovereignty, and a certain tendency to confuse the spheres of *de iure* and *de facto*, produce difficulties. It is the case of communities uniting themselves in a Federation, and resigning to it a part of their self-government, and either a part or the whole of their Sovereignty. There have been several such instances, but it will be sufficient to examine one.

When the thirteen semi-independent States—semi-independent because they had parted with some of their powers by the instrument of confederation of 1776—that lay along the Atlantic coast of North America adopted (between 1787 and 1791) the newly drafted Constitution of the Union, they neither expressly reserved nor expressly disclaimed the right to withdraw from it and resume their previous condition. Questions pre-

sently arose as to the right of a State to treat as null any act of the Federal legislature which she deemed to go beyond the powers conferred upon it by the Constitution, and ultimately as to her right to withdraw altogether from the Union. In the discussions of these points much stress was laid on the sovereignty which the several States had (so it was urged) originally possessed, which they had never in terms renounced, and which the Eleventh Amendment to the Federal Constitution had, when it declared that no State could be sued by a private person, virtually admitted.

The earlier statesmen, such as Hamilton and Madison, held that Sovereignty was by the Constitution divided between the Nation, acting through Congress and the President, and the States. This was all the more natural, because both the National and the State organs of government were agents of the people, from whom it was admitted that all powers had come, and in whom, therefore, ultimate Sovereignty must lie, though whether in the people as one whole, or in the several peoples of the several States, was another question. But the publicists of the next generation, who on each side led the contest over slavery, refused to acquiesce in any doctrine of division. Like Bodin, Hobbes, Bentham, and other Europeans, they proclaimed Sovereignty indivisible; but while the Northern men found it in the Nation as a whole, the Southerners, led by Calhoun, insisted that it remained in the several States, suspended or temporarily qualified, but capable of resuming its former proportions in each State whenever that State should quit the Union.

On these questions, which were treated as questions

of pure law, there was immense debate—acute, learned, passionate, and such debate might have gone on for ever; for each side had a perfectly arguable case, the point being one which the Constitution had (perhaps intentionally) evaded. The term Sovereignty acquired to the disputants a sort of mystic meaning, and many forgot that while the respective rights of the nation and the States were *de iure* the same in 1860 as they had been in 1791, a new state of things had in fact grown up, which the old *de iure* conception did not suit. Controversy there would in any case have been, but the controversy was greatly darkened by the metaphysical character which the use of the abstract term Sovereignty imparted to it; and which helped to conceal the momentous change which the political conditions of the country had undergone.

The moral of a concrete case like this is the same as that suggested by a study of the errors of the modern followers of Hobbes. Hobbes seems to assume that his Sovereign *de iure* will be also Sovereign *de facto*. Austin cannot admit any one to be a Sovereign who is not so both *de iure* and *de facto*. The lawyers on both sides in America grew so hot over their legal controversy as to forget the incompetence of law to deal with certain classes of questions. They ignored history, and got too far away from facts. In the sphere of pure law political facts need not be regarded, for Law assumes that while it remains law its decisions will be accepted. But when it is attempted to transfer the principles and conclusions of law to the sphere of controversies in which not only vast interests, but also violent passions are engaged, there is danger that the

law may turn out not to have been made for the new facts and not to be capable of dealing with them, so that efforts to apply it to them will not carry the full moral weight which law ought to exert. That each party should have a plausible legal case makes the risk of conflict greater, because men think themselves justified in resorting to force to defend their legal case, whereas if they left law out of the matter, they might be more willing to consider their chances of practical success, and therefore more ready to accept a compromise. What is deemed a good case *de iure* has sometimes proved a temptation to a weak State to resist when it had better have agreed with its adversary, or a temptation to a strong State to abuse its strength, whether by resorting to force when it ought to have accepted arbitration, or by expending on the annihilation of its opponent an amount of blood and wealth out of all proportion to the issues involved.

Knots which the law cannot untie may have to be cut by the sword. So it happened in the case of the United States. The Supreme Court tried its hand and failed. The only legislative authority which could have been invoked to settle the dispute by constitutional means was one consisting of a two-thirds majority of each House and a three-fourths majority of the States (acting either through Conventions or through their legislatures), such being the only authority capable of amending the Constitution. It was practically impossible to obtain a majority of three-fourths of the States for an amendment dealing with slavery or with State sovereignty. The resources of law being exhausted, the question of Sovereignty was tried *de facto*

by a war which lasted nearly four years, and in which about a million of men are supposed to have perished.

X. Conclusion.

Upon a review of the long and, on the whole, unprofitable controversies that have been waged regarding the abstract nature of Sovereignty, one is struck by the fact that with the possible exception of the German philosophers from Kant to Hegel, these controversies have been at bottom political rather than philosophical, each theory having been prompted by the wish to get a speculative basis for a practical propaganda. It was so when the Pope and the Emperor were at war in the days after Gregory the Ninth and Boniface the Eighth. It was so in the days of Bodin, of Althaus, of Hobbes, of Locke, of Rousseau, of De Maistre and Haller. The Romans and the English have contributed less to these controversies than most other nations, not only because both have been eminently practical as well as eminently legal-minded peoples, but because both had the good fortune to obtain a clear *de iure* Sovereign, who was for some centuries in Rome, and has been for some centuries in England (with short transitional periods, in both cases, of uncertainty), the undisputed possessor not only of *de iure*, but also of *de facto* power. Save during a few intervals of conflict, all that we English have needed to know about Sovereignty is where the law places it[1]. We were beginning to

[1] Indeed the recognition of the Great Council of the nation as the chief power in the State is still older: though its exclusive supremacy, *i. e.* its right to interfere with certain branches of the prerogative of one part of it, the Crown, remained long contested.

know this as far back as the thirteenth century; and just at the time when Bodin's book opens the long disputations of post-mediaeval theorists, Sir Thomas Smith set forth the legal supremacy of Parliament in words to whose clearness and amplitude nothing can be added to-day[1]. In the seventeenth century a struggle which arose over the respective rights of the component parts of this composite Sovereign was settled *de facto* by a civil war and by a revolution, which negatived any right of separate legislation claimed for the Crown and placed the judiciary in a position of independence. Yet the change then made *de facto* was so far from being fully expressed *de iure* that whoever should to-day study legal texts only, might conclude that the Crown and the House of Lords are just as important members of the composite Sovereign as is the House of Commons. Since 1689 *de iure* Sovereignty has coincided with *de facto* obedience. The idea that power *de facto* naturally goes along with authority *de iure* has grown to be almost a part of an Englishman's mental constitution, a happy result whereof let us all say—*Esto perpetua*. France and Germany have been less fortunate in their history, and consequently more prolific in their theories. Yet with the exception of a few belated defenders of the old doctrine of 'divine right,' French-

[1] In his *Commonwealth of England* (published in 1583): 'All that ever the people of Rome might do, either *Centuriatis comitiis* or *Tributis*, the same may be done by the Parliament of England, which representeth and hath the whole power of the realm, both the head and body. For every Englishman is intended to be there present, either in person or by procuration and attorney, of what pre-eminence, state, dignity, or quality soever he be, from the prince (be he King or Queen) to the lowest person of England, and the consent of the Parliament is taken to be every man's consent.' See an article by Sir F. Pollock in *Harvard Law Review* for January, 1895, and his *First Book of Jurisprudence*, p. 247.

men are now agreed as to the source of all political power, and the Germans, equally agreed upon this point, are chiefly occupied in debating where, according to the Constitution of their Empire, sovereign power is to be deemed in point of theory to reside.

After long wanderings through many fields of speculation, as well as many a hard-fought fight, all civilized nations have come back to the point from which the Romans started twenty centuries ago. All hold, as did the Romans, that sovereign power comes in the last resort from the people, and that whoever exercises it in a State, exercises it by delegation from the people. All also hold that in the internal affairs of a State, power legally sovereign—even if the Constitution subjects it to no limitation—ought to be exercised under those moral restraints which are expected from the enlightened opinion of the best citizens, and which earlier thinkers recognized under the name of Natural Law. The sphere in which no Sovereignty *de iure* exists, that of international relations, where all power is *de facto* only, is also the sphere in which morality has made least progress, and in which justice and honour are least regarded.

NOTE.

The above article was written, now a good many years ago (though it has been revised subsequently), when I had not before me some writings on the subject of Sovereignty, to which a brief reference ought to be made. First among them comes Sir H. Maine. Two lectures (in the volume entitled the *Early History*

of Institutions) contain an ingenious criticism of the system of Bentham and Austin. This criticism would now command general assent, yet Maine suddenly stops short of the conclusions one would naturally expect. He points out so clearly that most of the propositions of Austin are either unreal or self-evident, that one is inclined to fancy that the praise he nevertheless bestows is due more to respect for the destructive work which he holds Bentham and Austin to have done than to a belief in the substantial value of their doctrines. Mr. F. Harrison, in an article published in the *Fortnightly Review* some time afterwards, has a very interesting discussion of these two lectures, and of the Austinian theory, which he also condemns in substance, while handling it tenderly, and holding it to be serviceable as bracing to the reader's mind. Mr. D. G. Ritchie (now professor at the University of St. Andrew's), in an article on 'The Conception of Sovereignty' in the *Annals of the American Academy of Political and Social Science* for January, 1891, criticizes the Austinian view more stringently, and makes many acute remarks, with most of which I find myself in agreement. Mr. Henry Sidgwick devotes a chapter in his *Science of Politics* to the topic, and subjects the notion that Sovereign Power is absolute and irresponsible to a penetrating and suggestive analysis. Sir F. Pollock discusses the question in his *Introduction to the Science of Politics*, and shows very clearly the unsoundness of the Austinian view. Finally, Mr. C. E. Merriam, junior, in his *History of the Theory of Sovereignty since Rousseau*, has presented a full and useful account of the chief doctrines put forward on the subject, not stating a theory of his own, but adding pertinent criticisms on the views which he summarizes.

XI

THE LAW OF NATURE

I. The Idea of Nature as a Ruling Force.

It would not be possible, within the compass of anything less than a substantial volume, either to present a philosophical analysis of the ideas comprised or implied in the term Law of Nature, or to set forth and explain the various senses in which that term has been in fact employed, and the influence which, in those various senses, it has exerted as well upon political theory as upon positive law. What I propose to do here is something less ambitious and more closely connected with the study of the Roman law. It is to sketch in outline the process by which the notion of Nature as the source of law grew up and passed into philosophy, and from philosophy into legal thought; to show how the notion took a comparatively definite shape in the minds of the Roman jurists; to describe the practical use to which they put it, and finally to indicate (in the briefest way) some of the consequences in modern times due to the prominence which the Romans assigned to it. The subject has been treated by so many writers, some of them well known to all students, that much of it may be passed over as familiar. My chief aim will be to show that there is far less of a vague and merely abstract character in the conception than has sometimes been attributed to it; that it had a pretty definite meaning

to the Roman jurists; and that they used it in a thoroughly practical spirit.

When man, having attained some mastery over nature, begins to turn his thoughts to an explanation or classification of the phenomena among which he finds himself and of which he is a part, two general observations present themselves to his mind. The first of these is that beneath all the differences which mark off from one another the living creatures, both animals and plants, wherewith the world is filled, there exist certain noticeable similarities in respect of which they may be distributed into groups. Individual animals differ from one another, but all those of a certain kind or species have certain points in common, which constitute their character as a kind. So also different kinds have still many things in common. All sorts of dogs have certain common characteristics; and though dogs differ from wolves, dogs and wolves have many points of resemblance. Now the most general and most remarkable of these phenomena in which living creatures are alike to one another are the processes of growth through which they pass. They are born in a similar way; they enter on life small and weak; they become larger and stronger; they gain teeth at certain periods; they shed their hair or plumage at certain periods; they at last become weaker and die. So plants spring out of the earth from seed, shoot up and give off leaves, bloom into flowers, form seed, wither down again into the earth and die.

From the habit of noting these phenomena four conceptions seem to arise. The first is this, that of the various characteristics of each creature, those which

it has in common with other creatures of the same kind are the most deeply rooted and permanent. The second is that these characteristics exist from the origin of the creature, and are its Birth-gift. The third is that one group of the common characteristics, and the most important of them all, is the group which includes the phenomena of growth and decay. And the fourth is that in these phenomena of growth there is evidence of some sort of force working upon and through the creatures, something wholly irrespective of, and nowise referable to, their volitions, something stronger than they are, and which determines the course of their life-processes.

The second observation is that among human beings there is a similar identity of dominant characteristics combined with an endless diversity of individuals, a diversity greater than that between different individuals of each lower species. In all men, however otherwise unlike, there may be noted the same general tendencies, the same appetites, passions, emotions. It is these passions and emotions that move men's actions, and move them upon principles and in ways which are always essentially the same, despite the contrasts which one man presents to another, despite the jars and conflicts in each man which spring from the fact that passion may urge him in one direction, and interest in another, while fear may arrest action altogether. Thus there is formed the conception of a general constitution of man as man, over and above all the peculiarities of each individual, a constitution which is not of his own making, but is given to him in germ at the outset of his life, and is developed with the expansion of his

physical and mental powers. The most notable marks of this constitution of man as man are therefore its Origin at his birth, and its unfolding in the process of his Growth. So here also the phenomena of Birth and Growth stand out as the notes of that sort of unity which includes all mankind and makes Man what he is.

The language in which I am seeking to present these conceptions, though untechnical, is inevitably tinged by our modern habits of thought. But we may well believe that in substance such conceptions were present to persons of a reflective turn long before a set of abstract terms in which to express them had been invented. They had worked themselves into the texture of educated minds, and had been conveyed in figurative language by poets before metaphysicians laid hold of the matter.

When metaphysicians appear, that is to say, when thought, consciously speculative, begins to attempt systematic and comprehensive solutions of the problems of the universe which it has begun to realize as problems, a new period opens. Looking round upon the animated (and now also with a clearer eye upon the inanimate) world, philosophers feel the need of finding a Cause for the regularity they observe in the working of physical forces and in the growth of living creatures upon settled and uniform lines. They conclude that there must exist a power, either personal—a Deity or Deities—or impersonal, a sort of immanent and irresistible force in things themselves, which has stamped its will or tendency upon the movements and processes of the material universe. They discover

analogies between the action of such a Power in the inanimate and in the animated world, and between its action on other animals and its action on man. Thus they figure it to themselves as governing both on somewhat similar principles, and aiming at somewhat similar ends. The name they give it is drawn from Birth. It is Φύσις, *Natura*, Nature.

When they apply this method of inquiry or way of considering phenomena to Man regarded, not as a mere animal, but as a rational being, they find in him complex faculties and impulses working towards certain ends, ends which, despite infinite differences of detail, are substantially the same for all men. They note certain characteristics and tendencies which they call Normal, as being those prescribed by the general rules of his moral and physical constitution, and they deem every thing varying therefrom to be either a morbid aberration, or a fact of quite secondary consequence. And as in the wider sphere of animated being, so in that of man taken by himself, they conceive his constitution as being the result of a Power which has framed it with an intelligent purpose, so harmonizing its various activities as to fit them to attain a main and central end. Just as in the animal organism all the forces and processes of the body are so united as best to subserve its development, so in man regarded as a thinking being all the capacities, intellectual and emotional, seem to be correlated and guided by a presiding influence, that of the Rational Will, in obedience to which all the parts and all the impulses find their proper line of action. Thus that central and supreme power which in the material uni-

verse has been called Nature comes to be called in man Reason, and conversely, Nature is conceived of as necessarily Rational. For as in the universe at large the general tendency of things and that which makes their harmony is thought of, not merely as a fact, but also as a principle or pervading force, not merely as the sum of the phenomena, but also as a Power ruling the phenomena, so when a similar canon is applied by analogy to man, this power is found in Reason. And the recognition of reason as the harmonizing principle in man causes Nature, the force which gives to all things their shape and character, to be conceived of as an intelligent force moulding phenomena upon settled lines to definite ends.

Thus the conception of Nature, when it is ready to be applied to human society, includes two elements. One is that of Uniformity or Normality—the idea that the essence and ruling principle in all kinds of objects and beings and processes resides in that which they have in common, *i.e.* in the Type which runs through them. The other element is that of Force and Control—the idea that types have been formed and that processes work under the guidance of an intelligent Power, a power which in the case of the material universe may or may not be what is called conscious and personal (since as to this philosophers differ), but whose analogue in man is conscious and personal. Thus Nature and Reason are brought very near: or at any rate, there is what may be called a rational quality in Nature.

This view of nature and her processes as characterized by uniformity of action, and this view of such

uniformity as necessarily due to some directing Force, took shape, at a more advanced stage of thought than the stage we are now considering, in the much canvassed expression Laws of Nature[1]. This term, used to describe the uniformity of sequence in the phenomena of the material universe, opens up a line of reflection with which I am not here directly concerned. It is due to an imagined analogy between an ordered community, whose members obey rules made for them by a governing authority, and the ordered universe, every part of whose machinery works with a regularity which suggests rational direction by an irresistible Force. As laws are the framework of a State, so the sequences in the processes of Nature are deemed to be the framework of the external world. With the (moral) Law of Nature I am about to discuss these Laws of Nature—physical or external Nature—have of course nothing to do. In the latter, Nature, meaning the aggregate of natural phenomena, is passive, and obeys laws set to her; whereas the expression 'Law of Nature' represents her as the power which makes and prescribes laws. The 'Laws of Nature' are deemed to be imposed upon the world of nature by the Power which rules it, or, as the Greeks would say, they are laws given to the Kosmos by the Demiurgos; whereas our (moral) 'Law of Nature' is (as will presently appear) the law which Nature herself (or God 'the author of Nature') sets to mankind, her children. Nevertheless in the expression 'Laws of Nature' (in the physical

[1] The term has been extended from material phenomena to those dealt with by other sciences, such as economics and philology (*e.g.* laws of supply and demand, 'Grimm's law').

sense) the word Nature is sometimes used to describe, not only the passive subject which obeys, but also the active ruler who commands: and this double usage has tended to induce confusion. It may be partly responsible for the phrase 'a violation of the Laws of Nature,' though obviously a Law of Nature cannot be violated. All that phrase can mean is that men may, ignorantly or knowingly, act in disregard of a certain sequence of physical phenomena, receiving the inevitable recompense[1]. By the ancients, the two notions were not confounded, and indeed the phrase 'Laws of Nature,' in the precise sense it bears to moderns, occurs very rarely among them, as one may indeed say that the idea in any such sense as ours was by them but faintly apprehended[2]. But, distinct as these conceptions are, they have in common the notion that Reason as a Power presides over and orders all things. And Wordsworth has in a noble passage boldly identified with the moral law the Force which directs the majestically uniform march of the celestial bodies, when he says of Duty—

'Thou dost preserve the stars from wrong,
And the most ancient heavens by Thee are fresh and strong.'

[1] He who steals, breaks the law and may or may not be discovered or punished: he who puts his finger in the fire finds in the pain he suffers the operation of the regular sequence of physical phenomena.

[2] There is a passage in a Constitution of the Emperors Theodosius, Arcadius, and Honorius (*Cod. Theod.* Bk. xvi, Tit. x. 12) in which the term 'laws of Nature' is used in a sense which seems to come near the modern one. Forbidding any one to sacrifice victims or consult the 'spirantia exta,' the Emperors, after threatening punishment as in the case of treason, proceed to say, 'Sufficit ad criminis molem naturae ipsius leges velle rescindere, inlicita perscrutari, occulta recludere, interdicta temptare.' The expression may however mean nothing more than that it is impious to tamper with the principles which keep the secrets of nature from men's eyes. But in any case it is used in a sense different from that of the moral law which the ancients conceived to have been set by nature.

Now let us turn to the phenomena of political society and see how the conception works itself out in this field.

II. Origin of the Conception of Natural Law.

When the observer applies himself to social phenomena, he perceives again, as he has perceived in studying the whole animated creation, two facts equally patent and equally general—Uniformity and Diversity. In human customs, civil and religious, in the rules and maxims and polities of tribes and nations, there are many things wherein one community differs from another[1]. But there are also many things wherein all agree. All deem some acts, and speaking generally, though with many variations, the same kinds of acts, to be laudable or pernicious, and award praise or penalties accordingly. All recognize somewhat similar relations between individuals, or families, or classes, as indispensable, and try to adjust and regulate these relations upon similar principles. The forms which such relations take are no doubt differentiated by the particular stage, be it higher or lower, of civilization which various peoples have respectively reached. The customs of a number of savage tribes, while bearing some resemblance *inter se*, bear a slighter resemblance to those of more advanced nations. Yet even between the

[1] The famous dictum which Herodotus quotes from Pindar, 'Custom is the king of all mortals and immortals,' is quoted to show how usage makes a thing seem right to one people and wrong to another, but it was afterwards often taken in the sense of an assertion of the supremacy of Law over all things. Cf. Herod. iii. 38, and Chrysippus, *apud* Marcian in Justinian's *Digest*, i. 3. 2.

savage tribe and the semi-civilized or civilized community there are marked similarities, and the customs of the former are perceived often to contain the germ of what has been fully developed among the latter.

Now the customs and rules wherein tribes or nations agree are evidently the result of dispositions and tendencies which belong to man as man. In other words, they are the expression of what is permanent, essential, and characteristic of man, so that if a traveller were to come upon some hitherto undiscovered tribe, he might expect to find these phenomena present there, just as in each child as it grows up there appear the familiar qualities and tendencies which belong to the whole human species. Hence such phenomena of usage are deemed to be normal, and therefore Natural, that is, they are due to the Force which has made the human species what it is. So here in the sphere of human customs and institutions we perceive the same contrast between that which is variable as being due to circumstance or environment, or what we call chance, and that which is constant and uniform as being due to causes present, if not everywhere, yet at any rate in the enormous majority of cases. And the source of the constancy is to be found here in the political, no less than in the ethical and social sphere, in the constitution of man as a moral and intellectual being. Nature is therefore, on this view, a ruling power in social and political phenomena as well as in those of material growth and of moral development.

The customs and usages of mankind are the early forms of what come afterwards to be called Laws—seeing that all law begins in custom—as indeed the

Greeks call both by the same name. Accordingly those who began to philosophize about human society gave shape to their speculation in theories about Laws.

Now Laws, the rules and binding customs which men observe and by which society is held together, fall into two classes. Some are essentially the same, in all, or at any rate in most communities, however they may superficially vary in their arrangement or in the technical terms they employ. They aim at the same objects, and they pursue those objects by methods generally similar. Other laws differ in each community. Perhaps they pursue objects which are peculiar to that community; perhaps they spring out of some historical accident; perhaps they are experimental; perhaps they are due to the caprice of a ruler. Those which prevail everywhere, or at any rate, generally, appear to issue out of the mental and moral constitution common to all men. They are the result of the principles uniting men as social beings, which Nature, personified as a guiding power, is deemed to have evolved and prescribed. Hence they are called Natural. Being the work of Nature, they are not only wider in their area, but also of earlier origin than any other rules or customs. They are essentially anterior in thought as well as in date to the laws each community makes for itself, for they belong to the human race as a whole. Hence they are also deemed to be higher in moral authority than the laws which are peculiar to particular communities, for these may be enacted to-day and repealed to-morrow, and have force only within certain local limits.

This antithesis of the Customs and Laws which are

Natural, Permanent, and Universal to those which are Artificial, Transitory, and Local, appears in some other fields as well as in that purely legal one which we are about to consider. In particular, it takes three forms, which may be called the Ethical, the Theological, and the Political.

The ethical appears early, and indeed before there is any proper science of Ethics. One of the first difficulties which men advancing in civilization encounter is the conflict between the Law of moral duty ruling in the heart and the laws enacted by public authority which may be inconsistent with that law. This conflict is the subject of the *Antigone* of Sophocles. We are all familiar with the famous lines in which the heroine replies to the king, who had accused her of breaking the laws of the city, by declaring that those laws were not proclaimed by Zeus or by Justice, who dwells with the deities of the nether world:—

> οὐ γάρ τί μοι Ζεὺς ἦν ὁ κηρύξας τάδε
> οὐδ' ἡ ξύνοικος τῶν κάτω θεῶν Δίκη.

Antigone goes on to say that these laws of the gods, unwritten and steadfast, live not for to-day or yesterday, but for ever, and no one knows whence they spring:—

> οὐ γάρ τι νῦν γε κἀχθές, ἀλλ' ἀεί ποτε
> ζῇ ταῦτα, κοὐδεὶς οἶδεν ἐξ ὅτου 'φάνη.

The same poet enforces the same view in a lofty passage of another drama, where the moral laws are described as the offspring of the gods, and not of man's mortal nature, and which no forgetfulness can ever lap in slumber[1].

[1] Soph. *Antig.* l. 450; *Oed. Tyr.* l. 865.

The idea frequently recurs in later literature, and is nowhere more impressively stated than in the *Apologia* of Socrates, where the sage speaks of himself as being bound to obey the divine will rather than the authorities of the State, treating this divine will as being directly, though internally, revealed to him by 'a divine sign,' and being recognized by his own conscience as supreme.

The theological view is vaguely present in early times, as for instance in Homer, where certain duties, such as that of extending protection and hospitality to suppliants, are associated with the pleasure and will of Zeus. It is most familiar to us from St. Paul, who compares and contrasts the Law of Nature, which prescribes right action to all men, being instilled into their minds by God, with the Positive revealed Law which God has given to one particular people only.

'When the Gentiles which have not the Law, do by nature the things contained in the Law, these, having not the law, are a law unto themselves; which show the work of the law written in their hearts, their conscience also bearing witness, and their thoughts the meanwhile accusing or else excusing one another[1].'

A similar view, *mutatis mutandis*, is found in not a few of the Greek philosophers. Heraclitus speaks of one divine law whence all human laws draw nourishment. Socrates, as reported by Xenophon, contrasts the laws

[1] Rom. ii. 14, 15, where 'hearts' is probably to be taken in the ancient sense, which regards the heart and not the brain as the seat of the intellect. Cf. also Rom. i. 20, 'For the invisible things of God from the creation of the world are clearly seen, being understood by the things that are made, even his eternal power and Godhead, so that they are without excuse.'

of the city with the unwritten laws which in every country are respected as substantially the same, and says that these latter laws were laid down by the Gods for mankind[1], adding that the fact that their infraction carries its own penalty with it seems to suggest a divine source. Similar passages occur in Plato, who contrasts abstract justice and rightful laws with the actual laws and customs that prevail in political communities. The contrast becomes more definite in Aristotle, whose views are specially important, because they profoundly influenced the scholastic philosophers of the Middle Ages. He divides Justice as it appears in the State into that which is Natural and that which is Legal or Conventional, the former having everywhere the same force, while the latter consists of matters which were originally indifferent and might have been settled in one way or another, but which have become positively settled by enactment or custom. Some (he proceeds) think that there is no such thing as Natural Justice, because 'just things' are not the same everywhere, whereas physical phenomena are everywhere identical. This is true: nevertheless, even as the right hand is naturally stronger than the left, although there are left-handed men, so there is a real difference between rules which are and rules which are not natural[2]. Similarly, in a more popular treatise, Aristotle divides law into that which is Common, being in accordance with Nature and admitted among all men, and that which is Peculiar

[1] Xen. *Memor.* iv. 4, 19 sqq. θεοὺς οἶμαι τοὺς νόμους τούτους τοῖς ἀνθρώποις θεῖναι. These words are put into the mouth of Hippias, but are part of the argument which Socrates conducts.

[2] *Eth. Nicom.* v. 7.

(ἴδιος), settled by each community for itself[1]. This he treats as a familiar conception, to which an advocate pleading a cause may appeal when he finds positive law against him. He quotes the passage already cited from Sophocles, and two lines of Empedocles descanting on Universal Law. So Demosthenes refers to the 'common law of all mankind' which justifies a man in defending his property by force[2].

The Stoics took up the idea and worked it out with great fullness and force, especially on its ethical side. They developed the Aristotelian conception of Nature as the guiding principle immanent in the universe. This principle is Reason, *i.e.* the Divine Reason; and Natural or Common (= Universal) Law is its expression. So also in Man, who is a part of universal nature, Reason is the ruling and guiding element, ordering all his faculties in such wise that when they are rightfully developed in action he is obeying his true nature. Thus the formula 'to live according to Nature' becomes the concise statement of what is at once his duty and his happiness.

Philosophers were however by no means unanimous on the subject. The Sceptics and the New Academics denied altogether that there was such a thing as the

[1] *Rhet.* i. 10 and 13: *Λέγω δὲ νόμον τὸν μὲν ἴδιον τὸν δὲ κοινόν, ἴδιον μὲν τὸν ἑκάστοις ὡρισμένον πρὸς αὑτούς, καὶ τοῦτον τὸν μὲν ἄγραφον τὸν δὲ γεγραμμένον, κοινὸν δὲ τὸν κατὰ φύσιν. Ἔστι γάρ, ὃ μαντεύονταί τι πάντες, φύσει κοινὸν δίκαιον καὶ ἄδικον, κἂν μηδεμία κοινωνία πρὸς ἀλλήλους ᾖ μηδὲ συνθήκη.*

The lines of Empedocles refer to what it seems strange to call a part of Universal Law, the abstention from killing a living thing—*τὸ μὴ κτείνειν τὸ ἔμψυχον· τοῦτο γὰρ οὐ τισὶ μὲν δίκαιον τισὶ δ' οὐ δίκαιον,*

ἀλλὰ τὸ μὲν πάντων νόμιμον διά τ' εὐρυμέδοντος
αἰθέρος ἠνεκέως τέταται διά τ' ἀπλέτου αὐγῆς. (*Rhet.* i. 13.)

[2] *Against Aristocrates*, 639.

'naturally just (φύσει δίκαιον),' pointing to the diversities in the positive law of all States, and also to the disagreements among speculative thinkers. But the Socratic or Aristotelian or Stoic view prevailed, having ethical or religious considerations to recommend it to those who greatly desired to find an ethical basis for life, and, if possible, create thereout a religion.

What I have called the Political form of the idea is to be found in the notion, as old as Epicurus, that there is a close connexion between the Law of Nature and the Common Good, a connexion sometimes represented by saying that Natural Justice prescribes what is useful for all, sometimes by holding that practical utility is the test of whether any law is to be deemed to have the authority of Nature behind it[1]. This notion comes right down through the ancient world to modern times, and is really implicit in nearly all that has been written on the subject. No one would have repudiated the high metaphysical or theological view of the Law of Nature more vigorously than Bentham, yet there is an affinity between his method of applying utility as against positive laws and the methods of several of the ancient philosophers. And so a German critic is justified when he talks of Bentham and Austin as the 'propounders of theories of Natural Law.' With the political outcome of the idea, however, we are not at this moment concerned. It is enough to indicate how it has found expression in these various fields[2].

[1] Epicurus described Natural Justice as an agreement made for the sake of common advantage: τὸ τῆς φύσεως δίκαιον ἔστι σύμβολον τοῦ συμφέροντος εἰς τὸ μὴ βλάπτειν ἀλλήλους μηδὲ βλάπτεσθαι (Diog. Laert. x. 150).

[2] Since this Essay was in type I have seen the article *On the History of the Law of Nature*, by Sir F. Pollock, published in the *Journal* of the Society of

What I have sought to do in this introductory statement is to show how the notion of Nature as a force governing social as well as physical phenomena grew up, and to indicate the wide influence it had attained at the time when Rome became mistress of the world. Let us now turn to the Romans, and inquire what they meant by Natural Law, how the conception shaped itself in their hands, and to what practical use they turned it.

The Roman conception has two sources, the one historical, the other theoretical. I begin with the historical, which is the earlier in date, and incomparably the more important[1].

III. The Roman 'Law of the Nations.'

Long before the time when the city on the Tiber had become the undisputed mistress of Italy, Rome began to be the resort of many strangers who did not possess even that qualified kind of citizenship (summed up in the words *connubium* and *commercium*) which included the capacity for forming family ties, and for entering into business relations according to Roman

Comparative Legislation for Dec. 1900, and simultaneously in the *Columbia Law Review*, Jan. 1901; and am happy to find myself in substantial agreement with him upon all points of importance connected with the subject. Some branches of it, especially the Greek and mediaeval parts of the history of the idea, are treated of more fully by him, and the whole article is full of interest. Judicious remarks and useful quotations will also be found in Prof. D. G. Ritchie's *Natural Rights* (published in 1895), Part i; and in Dr. Holland's *Elements of Jurisprudence*, pp. 30-38 of ninth edition.

[1] A very minute and careful collection of the authorities regarding *Ius Naturae* and *Ius Gentium* may be found in the book of Dr. Moriz Voigt, *Die Lehre vom Jus Naturale, aequum et bonum und Jus Gentium der Römer.* I do not find myself always able to agree with his views, but they are stated with painstaking ability, and the citations have often aided me.

rules. These strangers or aliens (*peregrini*) had originally no civil rights, public or private, but they nevertheless dealt with Roman citizens, sold to them, bought from them, lent and borrowed money, entered into partnership, acted as factors or supercargoes, made wills, gave or received legacies. Similarly, some of them contracted marriages with Roman citizens, and became connected by various family bonds. It was necessary for the Roman courts to deal with the relations, and especially of course with the business relations, which were thus created. Yet the courts could not apply the rules of pure Roman law to them, because it was a precondition to the doing of certain formal acts under that law, to the holding certain legal relations, and (in some kinds of suits) to the use of the appropriate forms of procedure, that the doer or holder should be a full citizen. Accordingly the Roman courts, when they had to administer justice between these strangers, or between them and citizens, were obliged to find certain principles and rules which could guide their action in the same way as the principles and rules of the pure Roman law guided them when dealing with citizens.

The phenomenon of having a different law for strangers and for citizens is one which at first sight seems strange to us moderns, because in modern civilized countries ordinary private law is administered with little regard to the nationality or allegiance of the persons concerned, the law of the country being regularly applied, except where it can be shown that the domicil of a party to a suit, or the fact that a contract was made with reference to another law than that of the court exercising

jurisdiction, or the situation of the property dealt with, requires the application of some other (*i.e.* foreign) law[1]. But in the ancient world foreigners everywhere stood on a different level from citizens, as regards not only political, but also private civil rights; the sense of citizenship being much more intense in small communities, and there being no such bond of fellowship as the Christian Church subsequently formed for the Middle Ages and the modern world[2]. Indeed it was the Roman Empire and the Church taken together which first created the idea of a law common to all subjects and (later) to all Christians, a law embodying rights enforceable in the courts of every civilized country.

How then did the Roman magistrates find the law which they needed for the above-mentioned purpose? As they could not apply their own law, so neither could they select the law of any one of the States which surrounded Rome, because the persons between whom justice had to be done came from a great number of States and tribes, each of which had a law of its own. Being unable therefore to borrow, they were forced to create. They would appear to have created—I say 'appear,' because our knowledge of the matter is far from complete—by taking those general principles of justice, fair dealing, and common sense, which they

[1] In the days after the fall of the Roman Empire, however, different laws were applied to different sets of persons in the extra-European dominions of European States, *e.g.* the Roman law to the clergy and the provincial subjects, the barbarian law to barbarians. And the same thing happens now in countries where Europeans and Musulmans or semi-civilized tribes dwell side by side.

[2] Among some of the Greek cities, however, before they were engulfed in the Roman dominion, there had grown up a practice by which friendly commonwealths reciprocally extended certain civil rights to one another's citizens.

found recognized by other peoples as well as their own, and by giving effect to those mercantile and other similar usages which they found prevailing among the strangers resident at Rome. Thus by degrees they built up a body of rules and a system of legal procedure which, while it resembled their own system in many of its general features, was less technical and more consonant to the practical convenience and general understanding of mankind. They called it the Law of the Nations or of Mankind (*ius gentium*) [1], not in the sense of law valid as between nations (what we should call International Law[2]), but as being the common or general law, just as the expression *nusquam gentium* means 'nowhere at all[3].' It is the law which nations in general used and could comprehend. Each of these nations, or communities—Tuscans, Umbrians, Greek cities of Southern Italy, Carthaginians, and so forth—had a law of its own, with certain peculiarities which no other people could be expected to know or perhaps to relish. But the principles of good faith and equity

[1] The word *gens*, though we commonly translate it 'nation,' was originally used to denote a clan or sept (e.g. Fabii, Julii), and always retained this as one of its meanings. Can this original sense have had anything to do with the earliest legal meaning of the term? One is tempted to conjecture that there might have been a sort of common law of the *gentes*, recognized in contradistinction to the law of each *gens*, but when we find the term in the time of Cicero, it has the sense mentioned in the text, and I do not know of any facts supporting such a conjecture. So far back as one can go *ius quiritium* is the term applied to the law of the city as a whole.

[2] Though *ius gentium* is sometimes the term used to describe those usages which as being common to all men were in fact observed by States in their relation to one another; cf. Sallust, *Jug.* c. 35; Livy, i. 14; v. 36. Obviously the rules which all nations recognize would be those which they would apply in their dealings with one another.

[3] See the article *Ius Gentium* in Professor H. Nettleship's *Contributions to Latin Lexicography.* He thinks the term had become a popular one before the time of Cicero.

underlay, and were recognized in, the laws of all, so that this Law of the Nations represented the common element which all shared, and by which all might be content to be judged. Thus it comes near to what the Greeks had called the 'common law of mankind.' Yet it is not to be identified with that law, for it is conceived of as something concrete, resting entirely on the fact that men observe it, and possibly not always in accordance with abstract justice.

We need not here examine the question, which indeed our data do not enable us to answer, by what practical methods or processes the Roman Courts proceeded to frame this Law of the Nations; whether, and if so how far, they actually did inquire into the customs and rules of the peoples with whom they came most in contact; or whether they were content to proceed upon the general principles of justice and utility; or whether they followed in the main their own law, stripping off its technicalities while preserving its substance. All three methods might be more or less used. But probably they were chiefly influenced by the customs which they found actually recognized by traders from various nationalities resident at Rome. Before the Courts stepped in to administer justice among the strangers, commercial practice had doubtless created a body of customs which were in fact observed, though no express and binding sanction had yet been given to them. One may illustrate this by recalling the fact that much of our own mercantile law is based upon the customs of merchants which English Courts, seeing them recognized by honest traders as actually binding, and seeing that contracts were made with regard to them, and that

they were in fact understood as being conditions implied in such contracts, proceeded to enforce, treating them as being really part of the contract. This process of turning custom into law went on actively so late as the time of Lord Mansfield, of whom it has been said that he and the juries at the Guildhall in the City of London created no small part of English commercial law. So the English officials, when they began to administer justice among traders in India, found a number of customs actually observed, and built up a body of law out of these rules, *plus* their own notions of what was fair and just, together with such recollections as they had of the principles of English law[1].

What is certain is that the Romans did not formally enact any parts of this new Law of the Nations. It was built up solely by the practice of the courts and the action of the jurists; and it took definite shape only in the edicts of the Praetors and Aediles[2]. By the end of the Republic it had grown to considerable dimensions, and long before that date had begun to exercise a potent influence upon the development of the law which belonged to citizens only, and which was therefore called *ius civile*. Such dicta of the professional jurists regarding *ius gentium* as we possess belong to a later time, and the earliest authority who mentions it is Cicero. He says that 'our ancestors distinguished the law of citizens from the law of the

[1] See Essay II, vol. i. pp. 113–118.

[2] See as to this Essay XIV, p. 292. Thus Praetor-made law, *ius honorarium*, very largely coincides with and covers the field of *ius gentium*, but the two are by no means identical. The *actio Publiciana*, for instance, belonged to the former, but not (except so far as natural equity suggested it) to the latter. So in *Digest* xvi. 3. 31 'merum ius gentium' is opposed to 'praecepta civilia et praetoria.'

nations, that which is proper to citizens not being therewith part of the law of the nations, whereas that which belongs to the law of the nations ought to belong to the law of citizens also[1]'; and in several other passages he contrasts the two kinds of law, observing in one place that the *ius gentium*, like part of the *ius civile*, is unwritten, *i. e.* not included in statutory enactments[2]. He talks of it as a body of positive law resting on custom and agreement, but unfortunately does not tell us how that particular part of it which the Roman Courts administered had been formed. We may, however, safely conclude that the procedure of the magistrates in granting actions and allowing defences in certain cases had been the chief agency whereby it received a definite form, and that the materials were (as already observed) chiefly furnished by the habits of dealing which had arisen among the strangers resident at Rome in their intercourse with Romans and with one another, in their bargains and transfers of property, in the forms and conditions relating to loan and pledge and selling and hiring, such conditions being usually embodied in documents to which a specific legal effect would be attached. Broadly speaking, the basis or source of the underlying principles of *ius gentium* would as respects commercial matters be found in good faith and common sense, and as respects family matters and inheritance in natural affection.

This sketch, slight as it is, may suffice to indicate how the Romans were brought to deal in a concrete and

[1] 'Itaque maiores aliud ius gentium, aliud ius civile esse voluerunt. Quod civile, non idem continuo gentium, quod autem gentium, idem civile esse debet' (*De Off.* iii. 17. 69).

[2] *Orat. Partit.* xxxvii. 130.

practical way with the phenomenon we were considering on its abstract side, viz. the distinction between customs and laws which are substantially common to all (more or less civilized) communities, and those which are peculiar to one or a few only. That which struck a Greek thinker who reflected on the state of the Mediterranean world in the fifth or fourth century B. C., viz. virtual uniformity in some customs and laws, endless diversity in others, struck every Roman magistrate who had to preside in urban or provincial courts during the third and second centuries B. C. The Greek formed a philosophic theory: the Roman, being a ruler, was forced to construct a working system. But the Greek had little occasion to apply his theory; and the Roman did not think of basing his system on any theory at all. His *ius gentium* grew up and spread out and bore fruit, and was already influencing both the old law of Rome herself and the administration of Roman courts in the provinces before (so far as we know) anybody had thought of connecting the Law of Nature with the Law of the Nations.

IV. Connexion of the Law of Nature with the Law of the Nations.

This connexion belongs to the last days of the Roman Republic, and was probably due to that increased interest in philosophy and ethics which owed so much to the literary activity of Cicero, who was not only a statesman and an orator, but an ardent student of philosophy and a voluminous writer on philosophical, especially ethical, topics. It is the fashion now to depreciate Marcus Tullius. He was probably also

depreciated in his own time. The learned black-letter lawyers, who had been his fellow pupils under Q. Mucius the Augur, doubtless said of him, as Sugden is reported to have said of Lord Chancellor Brougham, that if only he knew a little about law he would know something about everything. And the Greek philosophers with whom he loved to discourse probably hinted to one another, when their eloquent patron was not by, that, after all, no Roman would ever be a thinker. We can admit a measure of truth in both criticisms. But Wisdom is justified of all her children, and Cicero has outlived both the lawyers and the philosophers of his own time. His eager and capacious intellect, playing round political and legal, as well as metaphysical and moral inquiries, and using a brilliant style to popularize and render attractive all that he touched, gave a currency to the ideas of Greek speculators which made them tell more widely than ever before upon the Roman mind, and all the more so when, in the generation that succeeded his own, the career of political distinction through forensic and senatorial and platform oratory began to be closed by the growth of an absolute monarchy. Indeed Cicero's own philosophical treatises were due to that retirement from active political life which the ascendency of Julius Caesar caused; and his composition of them was prompted (as he tells us) by a wish to stimulate the flagging public spirit of his younger contemporaries.

Now the theory of the Law of Nature, suggested by Heraclitus and Socrates, preached more actively by Zeno and Chrysippus, had been much discussed and widely diffused during the centuries between Aristotle and Cicero. Its acceptance and influence were aided

by the changes which had been going on in the world, the Hellenization of Asia, the admixture of religions and mythologies, and that more easy and frequent intercourse between the Western and Eastern Mediterranean countries which enabled the peoples to know more of one another. The doctrine, though not confined to the Stoics, received among them special prominence, and became a corner-stone of their ethical teaching. Moral duty was by them practically deduced from, or identified with, the Law of Nature. Cicero, though he would not have described himself as a Stoic, substantially adopts their language on this point, and lays great stress on Nature as the source of the highest law and morality, invoking the doctrine in his speeches as well as expounding it in treatises[1]. With him the Law of Nature springs from God, is inborn in all men, is older than all the ages, is everywhere the same, cannot be in any wise altered or repealed. It is the basis of all morality. It ought to prescribe the provisions of positive law far more extensively than it in fact does, and to give that law a higher and more truly moral character. We might expect Cicero to go on, if not to identify it with the *ius gentium* which he contrasts with the peculiar law of Rome, at any rate to describe it as the source and parent of *ius gentium*. This, however, he does not actually do, though more than once he comes near it[2]. *Ius gentium* is to him a part

[1] See especially the fragment of his *De Republica* preserved by Lactantius, *Div. Inst.* vi. 8, 7.

[2] Many writers have, however, thought that Cicero did mean to identify *ius gentium* and *ius naturae*, basing themselves on *De Off.* iii. 17, 69, and iii. 5, 23. Cf. also the words 'lege . . . naturae, communi iure gentium' in *De Harusp. Respons.* 15, 32, and 'consensio omnium gentium lex naturae putanda est' in *Tusc. Disp.* i. 13. The point is argued, at great length, by

of positive law, though much wider in its range than *ius civile*, whereas the Law of Nature is altogether an ethereal thing, eternal, unchangeable, needing no human authority to support it, in fact St. Paul's 'law written on the hearts of men.'

Although Cicero was the most copious and eloquent writer among those Romans who pursued the study of philosophy in his generation, he did not by any means stand alone. Most of the prominent statesmen, orators, and authors occupied themselves with ethical speculation; and this was no less true of the leading spirits of the following century. The great jurists of the Augustan and post-Augustan age, such as Antistius Labeo, Massurius Sabinus, and Cassius, refer to the Law of Nature as a source of law already familiar. Two influences were indeed at work, which gave to philosophy a greater prominence than it had perhaps ever enjoyed before or has ever enjoyed since. Faith in the old religions having practically vanished from the educated classes, some substitute was needed, and the more pure and earnest minds sought this in philosophy. The career of political life having been, in its old free form, closed by the vesting of all real power in the hands of one person, who presently became recognized as legally sovereign, men were more and more led to seek solace, or enjoyment, or at any rate occupation, in the study of metaphysics and ethics. Jurisprudence continued to be pursued by many of the most powerful and

Voigt (*op. cit.* vol. i. pp. 65–75, 213–219, and Appendix II). Nor does Cicero quite precisely define the relation of his Laws of Nature to positive law. He writes rather as a moralist than as a jurist.

cultivated intellects; and philosophy was not only a main part of education which such men received, but claimed much of their time and thought. They were so permeated by it, that both its methods and its principles must needs influence their treatment of legal matters, whether as writers, or as magistrates, or as advisers of the monarch and framers of legislation. The idea of the Law of Nature as the source of morality and the true foundation of all civil laws, the idea of all mankind as forming one natural community of which all are citizens, and in which all are equal in the eyes of Nature—this idea had come to pervade the minds of thinking men, whether or no they were professed adherents of any school of philosophy. It was taken as a generally accepted truth, and was therefore assumed and referred to without adducing arguments on its behalf, far removed from the actual facts of the world as was the ideal to which it pointed.

The growth and acceptance of the doctrine may be compared with the process whereby certain notions, now pretty generally received in nearly all civilized countries, have made their way during the last two centuries. Such are the doctrines known in America as those of the Declaration of Independence, and in France as the principles of 1789. Such is the doctrine of the freedom of the individual conscience, and the consequent wrongfulness of religious persecution. These doctrines began to be asserted (especially in England) during the seventeenth century. They were diffused slowly, and constantly denied by the powers that be, but they have been now virtually accepted in

principle by all thinking men. Few think it necessary to argue on their behalf; yet they are very far from having secured their full effect, for in some countries the rulers refuse to apply them, and in almost all countries they are admitted to be subject to exceptions which render their full application difficult. They represent rather an ideal towards which society is held to be moving, than a positive basis on which existing society is built.

Although, however, the Romans of the earlier imperial period saw that their conception of the Law of Nature was a long way from being realizable in such a world as was then present, they also discovered in the changes that had passed upon that world much which recommended the conception as true and sound. The extension of Roman dominion was completing the process which the conquests of Alexander the Great had begun. Eastern religions invaded the West; Greek and Latin became world-languages; commerce brought all the Mediterranean peoples together; nations and nationalities were blent and ultimately fused in a common subjection to Rome. The provincial rose as the old Roman citizen sank, so that equality came nearer and nearer. The old mutually exclusive systems of citizenship and law seemed obsolete; and therewith the traditional reverence for the ancient legal institutions of the Quirites passed away, even from the conservative minds of lawyers[1]. In particular the idea of

[1] There does not, however, seem to be any ground for the notion that the Roman lawyers ever despised *ius gentium* as only fit for inferior people; that they deemed it 'an ignoble appendage to their civil law,' as Sir H. Maine says. That this was ever their feeling is mere surmise. No traces of such a view appear in our authorities.

a community of all mankind, as opposed to the small civic communities of earlier days, began to approach a realization in the great empire which had gathered all civilized men under its wings, had secured for them peace, order, and a just administration of the laws, and had admitted every one, whatever his race, tongue, or birthplace, to a career of honourable ambition in civil and military office, a career whose possibilities included even the imperial dignity itself.

For this all-embracing commonwealth, this *societas omnium hominum*, of which the Greek philosophers and Cicero had written, and which had taken concrete shape in the Roman Empire, there would seem to be needed some common law, since the ideas of law and state were correlative[1], according to the dictum, *Quid est civitas nisi iuris societas*[2]? Now there was a law which could actually be applied to all Roman subjects, non-citizens and citizens alike, and which was supposed to be the law common to all men as being the law which all nations used, and which had therefore been applied by Roman Courts where persons outside the pale of Roman law proper were concerned. Just as the law of Rome drew its authority from the will of the people, whether signified expressly by enactments or tacitly by usage and consent, so this general law rested on custom, on the understanding and will of collective mankind, evidenced by their practice; and its source was therefore one which met and satisfied the view that the community are the source of law. Now this

[1] Not, of course, in the Austinian sense that law is only what the State has expressly enacted, for the ancients always dwell upon custom (*mores maiorum, consuetudo inveterata, consensus utentium*) as a chief source of law.

[2] Cic. *De Rep.* i. 32. 49.

common law of mankind was the *ius gentium*. Though in point of fact gathered and moulded by Roman Courts, it was deemed to represent the essence of the law which prevailed among various neighbour peoples, and of the usages which common sense and the needs of commerce had sanctioned among men in general, wherever dwelling. It was conceived of as being common to all mankind (*ius commune omnium hominum*[1]) (*omni humano generi commune*[2]), or as the law which exists among all peoples (*ius quod apud omnes populos peraeque custoditur*[3]) (*ius quo gentes humanae utuntur*[4]). It was applicable to persons who had no rights of citizens in any city (ἀπόλιδες)[5]. It was coeval with the human race itself (*cum ipso humano genere proditum*[6]). It was in all these respects contrasted with *ius civile*, just as the Law of Nature (*ius naturale*) was similarly contrasted. Finally it was the law which natural reason had created (*ius quod naturalis ratio constituit*[7]). When this point had been reached, it became practically identical with the Law of Nature, and the identity, implicitly suggested in Cicero's remark that the agreement of all nations must be deemed a law of nature[8] was formally enounced by jurists at least as early as the time of Hadrian. In Justinian's *Institutes* the identification is complete.

[1] Gaius, *Inst.* i. 1; *Dig.* i. 1. 9.

[2] In *Inst. Iust.* i. 2. 2, taken from Marcian.

[3] Gaius, *Inst.* i. 1.

[4] Ulpian in *Dig.* i. 1. 1, 4.

[5] Marcian in *Dig.* xlviii. 19. 17.

[6] Gaius in *Dig.* xli. 1. 1, *pr.*

[7] Gaius, *Inst.* i. 1. The formal express and specific identification is to be found only in some jurists, and is most explicitly stated by Gaius. There does not, however, seem to be sufficient ground for thinking (as Voigt, *op. cit.*, argues) that there was any real difference of opinion among them. Their language on these points is seldom precise.

[8] See p. 137, note 2, *supra*.

A third conception, to which reference has not yet been made, contributed to this fusion, viz. the conception of Equity (*aequum et bonum*, *aequitas*). Equity means to the Romans fairness, right feeling, the regard for substantial as opposed to formal and technical justice, the kind of conduct which would approve itself to a man of honour and conscience. It completes the idea of the higher kind of law by adding a third element, or rather a third source, that which springs from the breast of man and represents his natural sense of justice, his sympathetic good feeling towards his fellow men. Thus we may say that seen from the point of view of theology or metaphysics, this universal or Natural law is prescribed by God or by Nature. Seen from that of history and political science, it issues from the will of mankind, who, organized as nations, have created it by custom and practice. Seen from the side of ethics and psychology, it represents the tendencies and habits of the typical good man, who desires to treat his neighbour as he would wish to be himself treated. The coincidence of these three streams of origin or lines of thought enlarges the conception, defines it, gives to it, taken as a whole, a harmonious symmetry. Thus it becomes complete on its theoretical as well as on its practical side.

In the Roman jurists of the best age we note three qualities not always united in lawyers—a love for theoretical perfection, an attachment to ancient usage, and a sense of practical convenience. The first delivered them from the tyranny of the second, the second moderated their devotion to the first, the third found a middle term between the other two and guided them in the

adjustment of principle to fact. The blending of the notion of Natural Law, as the ethical standard of conduct and the ideal of good legislation, with the notion of the law formed by the usages and approved by the common sense of all nations as embodying what was practically useful and convenient, satisfied both the philosophical and the historical instincts of the jurist. Had there been a similar combination of ideas and habits in the English jurists of the seventeenth and eighteenth centuries, our legal progress would have been more rapid, and, if the phrase be permissible, more ordered and rhythmical.

V. Relation of Natural Law to General Customary Law.

There are, however, misconceptions against which we must be on our guard in grasping and appraising this identification of Natural Law with the sum of that which is common in the customs of mankind.

In the first place it was not a complete identification. There were some points in which Natural Law and the Law of the Nations differed, and one of these was of profound importance. That point was Slavery. It was universal in the ancient world, and so must be deemed a part of *ius gentium*. But philosophers had pointed out (even before the time of Cicero) that it was contrary to nature[1]. Here, therefore, is a large department in which the sanction of Nature could not be claimed for this part of *ius gentium* any more than it could for much of *ius civile*. Slavery, says one jurist, is an institution of the Law of the Nations,

[1] Ulpian in *Dig.* l. 17. 32.

whereby one man is subjected to the ownership of another against Nature[1]. And where we find the rigour of the old law of Slavery modified, this is always said to be in deference to nature and humanity, not to anything in *ius gentium*. And the Roman jurists indeed go so far as to hold that by Nature all men are equal[2]. So on the other side there were some provisions of statute law (for instance, in the rules regarding inheritance) which, though they had been suggested by principles ascribable to the Law of Nature, were, as resting on Roman statutes, referred to the category of *ius civile* rather than to that of *ius gentium*.

Secondly, the Romans did not, when they referred any particular institution to the *ius gentium*, necessarily intend to convey that it was universally prevalent. The origin of *hypotheca* for instance (mortgage of immovables) and of the *syngraphe* (written acknowledgement of a debt) was due to Greek usage, and by no means general over the world. These legal institutions, however, since they did not belong to Roman law proper, were held to be part of *ius gentium*.

Thirdly, there is no ground for thinking that when the Roman jurists said that Natural Reason was the source of *ius gentium*, they had altered their historical view of the origin and character of the latter body of law, or fancied that there ever had been an age, however remote, however simple and primitive, during which its precepts, in any concrete shape they knew

[1] *Dig.* i. 5. 4, § 1: cf. *Inst.* i. 5; Gaius, *Inst.* i. 52.

[2] The doctrine that slavery is against nature was older than Aristotle, who does not accept it. The orator Alcidamas (a contemporary of Socrates) said ἐλευθέρους ἀφῆκε πάντας θεός· οὐδένα δοῦλον ἡ φύσις πεποίηκεν. See W. L. Newman's *Politics of Aristotle*, Introduction, p. 141.

or could imagine, had actually prevailed among mankind. The expression 'lost Code of Nature,' which a distinguished writer has used [1], is therefore an unfortunate one, for it seems to imply that the Romans were under the belief that there had once been a so-called State of Nature, in which the *ius gentium* served as law. So far were they from such a delusion that they ascribe to *ius gentium* war, captivity, slavery, and all the consequences of these facts, while in the golden age, the *Saturnia regna* of the poets, all men were free [2] and war was unknown—

> 'Necdum etiam audierant inflari classica, necdum
> Impositos duris crepitare incudibus enses [3].'

Their identification of the Law of Nature, which they accepted as a doctrine of philosophy, with the Law of Nations, which their courts had been administering and their text-writers expounding for two or three centuries at least, affected neither the essentially ideal character of the former nor the distinctly practical character of the latter. Had it done either of these things it might have worked for evil. But in point of fact it did not palpably quicken the pace of legal reform, nor did it induce any theoretic vagueness in their views of law, or suggest crochets or subtleties which could impede the manipulation of positive rules. The jurists use

[1] Sir H. Maine in *Ancient Law*. It will be seen that the view which he takes of *ius gentium* and *ius naturae* seems to me to be in several points at variance with the facts; but I need hardly say that no one feels more strongly than I do the value of the stimulus to English study and thought on these subjects which his fertile mind and brilliant treatment have given, and for which all subsequent writers must be grateful.

[2] Cf. Macrob. *Saturn.* i. 7; and Justin. *Hist.* xliii. 1, who says that not only slavery but also private property was unknown under the reign of Saturn, so great was his justice!

[3] Virg. *Georg.* ii. 539.

the two terms as practically synonymous, though generally employing *ius naturae* or *naturalis ratio* when they wish to lay stress on the motive or ground of a rule, *ius gentium* when they are thinking of it in its practical application. To borrow the language of logic, the connotation of the two terms is different, while their denotation (save as aforesaid, and especially save as regards slavery) is the same.

Thus happily united by a synthesis which satisfied at once the practical good sense and the philosophic temper of the Roman jurists, the two conceptions of the Law of Nature and the Common Law of Mankind went on their way rejoicing. But after a while an event befell which deprived the latter expression of its ancient concrete basis, and rendered it, except for historical purposes, and as a description of a body of rules of a particular historical origin, virtually obsolete. This was the extension of Roman citizenship to all the subjects of the Roman Empire by an edict of the Emperor Antoninus Caracalla between 212 and 217 A. D., an act which destroyed the distinction between *ius gentium* and *ius civile* so far as the persons governed by each were concerned, for there were thereafter comparatively few *peregrini* (non-citizen subjects), since *ius civile* was now enjoyed by all the dwellers in the Roman world[1].

[1] There remained as aliens (1) the class called *dediticii*, the lowest species of freedmen, (2) persons deprived of citizenship as a punishment for crime, (3) foreigners, *i. e.* subjects of some other State temporarily resident in the Empire, and probably also persons imperfectly manumitted subsequently to the Edict, together (possibly) with the inhabitants of territories added to the Empire subsequently to the Edict. See Muirhead (*Historical Introduction to the Private Law of Rome*, 2nd edition, by Professor Goudy, p. 319), and, for a fuller discussion of the topic, Mitteis, *Reichsrecht und Volksrecht in den östlichen Provinzen des Römischen Kaiserreichs*, chap. vi.

This may be one of the reasons why, in the constitutions of the Emperors collected in the Codes of Theodosius the Second (A. D. 438) and of Justinian (A. D. 534), constitutions the earliest of which date from Hadrian, the term *ius gentium* never occurs. It is frequent in the *Institutes* of Justinian (A. D. 533), but that book (based on the *Institutes* of Gaius) is, although a statute, yet primarily a manual for learners who were going to use the extracts from old jurists contained in the Digest, so that the term could not be omitted. When the later Emperors wish to assign a ground for some enactment which they are issuing, they commonly speak of Nature, or Natural Reason, or Humanity, or Equity, using these words almost indiscriminately to describe the same thing.

VI. Meaning attached by the Roman Jurists to Nature.

Now let us inquire a little more closely what the Roman jurists and legislators meant to convey when they talk of Nature, or the Law of Nature, and what are the positive rules of law which they ascribed to this source, or established in obedience to this principle.

The following senses in which they use the word Nature may be enumerated, though these cannot be sharply distinguished, for some run into others.

1. The character and quality of an object, or of a living creature, or of a legal act or conception (e. g. *natura venenorum*, *natura hominum*, *natura apium* (*fera est*), *natura contractus*, *natura dotis*).

2. The physical system of the Universe (*rerum natura*), and the character which it bears. Thus it is

said that Nature has taken some objects (*e.g.* the sea and air) out of the possibility of private ownership.

3. The physical ground of certain relations among men, as for instance of blood relationship (*cognationem natura constituit*). So the rule that children born out of wedlock follow the condition of the mother is ascribed to Nature (*liberi naturales*); so the rule that persons under puberty should have a guardian.

4. Reason, whether in the sense of logic and philosophical principle on the one hand, or as meaning what we should call 'common sense' on the other, is often denoted by the term Nature. Nature (it is said) prescribes that no one should profit by harm and injury to another, and that whoever bears the disadvantages of a thing should also reap the advantages of it; and Nature allows a buyer to make a profit on a re-sale. The expression Natural Reason (*naturalis ratio*) is commonly used when the former meaning is to be conveyed, and Paulus indeed says that Natural Reason is a sort of tacit law. To use the term Reason as equivalent to common sense and convenience comes very near the doctrine that Utility is the basis of law, and the word *utilitas* is frequently employed by the Romans.

5. Good feeling and the general moral sense of mankind. For instance, Nature directs that parents should be supported by their children, and that a freedman should render a certain respect and help to his patron. Nature prohibits theft, and makes certain offences (*e.g.* adultery) disgraceful, while other offences are not necessarily base (*turpia*). So—and this is an interesting illustration of Roman sentiment—it is against Nature to contemplate the probability that a freeman may become

a slave—although this is an event which may sometimes happen. One may refer either to this or to the preceding category the ascription to Nature of the principle that faith must be kept by a debtor, even where he has not bound himself in a formal way. (*Is Natura debet quem iure gentium dare oportet, cuius fidem secuti sumus.*)

One jurist only, Ulpian, gives a yet further sense to the term Law of Nature, making it cover those instincts and physical relations which other animals have in common with man, and which may be called the raw material upon which Custom acts[1]. But this fancy of his, which appears now and then in other ancient writers[2], and received great attention in the Middle Ages because the passage was embodied in Justinian's *Institutes*, is devoid of practical importance even for Ulpian's own treatment of legal topics. It has been much ridiculed by the moderns, but has recently received a sort of reinforcement or illustration from an unexpected quarter. Mr. Darwin has suggested that the origin of our moral ideas is to be sought in the accumulated experience of animals, which in the course of long ages ripened, to some slight extent, in the higher species, and ultimately ripened far more completely in man, into the beliefs and usages which

[1] 'Natural Law is that which Nature has taught all animals; for that kind of law is not peculiar to mankind, but is common to all animals. . . . Hence comes that union of the male and female which we call marriage; hence the procreation and bringing up of children.'

[2] As, for instance, in Pliny the Elder's ascription to the lower animals of moral sentiments (*Hist. Nat.* viii. 5; viii. 16, 19; x. 52). Michael Drayton's lines, of birds pairing in spring,—

'And but that Nature by her all-constraining law,
Each bird to her own kind this season doth invite,'—

hover between Ulpian's 'Law of Nature' and the 'Laws of Nature' of modern science.

govern the life of primitive peoples, and out of which morality has been insensibly developed in comparatively recent times. Upon any such hypothesis the gap between man and other animals would become less wide, and a certain community might be ascribed to them with man in what may be called the rudimentary protoplasm of customary law.

In its practical applications, the idea of Nature or the Law of Nature, blent with the idea of Equity (for the two terms are in some departments, and in the mouths of many jurists, equivalent and interchangeable), extends itself over nearly the whole field of law. It supplements or modifies the relations of parents and children, of patrons and freedmen, and even of slaves, as these relations had been established by the ancient strict law of Rome. A slave is to *ius civile* merely a thing, but a regard for Nature causes him to be treated as being in some respects a person. In the law of property, of inheritance, of obligations, and of procedure, a great many principles drawn from this source have been embodied in rules which qualify or supersede the rigour of the older law in most important points. It is only by examining these in detail that the skill, and tact, and sound judgement, which the Romans showed in working out the idea, can be duly appreciated. To enumerate them here would, however, be impossible: one might as well try to enumerate the numerous points in which Equity has affected and amended the common law of England.

Speaking broadly, the Law of Nature represented to the Romans that which is conformable to Reason, to the best side of Human Nature, to an elevated

morality, to practical good sense, to general convenience. It is Simple and Rational, as opposed to that which is Artificial or Arbitrary. It is Universal, as opposed to that which is Local or National. It is superior to all other law because it belongs to mankind as mankind, and is the expression of the purpose of the Deity or of the highest reason of man. It is therefore Natural, not so much in the sense of belonging to men in their primitive and uncultured condition, but rather as corresponding to and regulating their fullest and most perfect social development in communities, where they have ripened through the teachings of Reason[1]. But if any disciple of Bentham, looking not at the sonorous language occasionally used to describe its origin, but at its practical applications, calls it the expression of good sense and good feeling, the law which springs from an enlightened view of Utility, he will not be far wrong, as indeed the idea of practical convenience is frequently associated with those of Nature and Reason in the Roman texts[2]. A modern precisian might say that the Romans ought to have called it not 'the Law of Nature,' but 'materials supplied by Nature for the creation of a law,' a basis for law rather than the law itself. To the Romans, however, such a criticism would probably have seemed trivial. They would, had the distinction been propounded to them, have replied that they knew what the critic

[1] This is, broadly speaking, the view of the Classical jurists. But occasionally, especially in late times, phrases are used which point to primitive societies as governed by the natural law: e. g. *Novell. Iust.* lxxxix. c. 12, § 5.

[2] So in a fragment preserved by Dositheus, a jurist of classical times says of 'ius naturale vel gentium'—'omnes nationes similiter eo utuntur: quod enim bonum et aequum est omnium utilitati convenit.'

meant, and had perceived it already; but that they were concerned with things, not words, and having a practical end in view, were not careful about logical or grammatical minutiae.

This conception, or at any rate the attempt to apply this conception to Positive Law, would seem to be exposed to two dangers. One is that of wasting time and pains in hunting for those institutions or rules which are most characteristic of man in the earlier stages of his progress, or which have been in fact most generally in vogue among men. This danger the Roman jurists completely avoided. Their Law of Nature had nothing to do with any so-called State of Nature, and they never troubled themselves about primitive man, leaving him to the poets and the philosophers. And though they talked of their *ius gentium* as roughly equivalent to their *ius naturae*, we do not find them endeavouring to support their view of what is reasonable and natural by instances drawn from such and such peoples who had adopted the rules they had themselves made part of their *ius gentium*[1]. They are content to ascribe to *ius gentium* that which is so obviously reasonable and convenient that the general usage of mankind approves it, such as the principle that the shores of the sea are open to the common use of all (a principle which, however, English and Scottish law have never fully admitted), the principle that a thing which has no owner

[1] Although they sometimes dwell on the fact that an institution is to be found among all nations. So Gaius observes of Guardianship, 'Impuberes in tutela esse omnium civitatium iure contingit, quia id naturali rationi conveniens est ut is, qui perfectae aetatis non sit, alterius tutela regatur; nec fere ulla civitas est in qua non licet parentibus liberis suis impuberibus testamento tutorem dare' (*Inst.* i. 189).

becomes the property of the finder, the principle that a debtor ought to pay his debts. *Redde quod debes aequissima vox est, et ius gentium prae se ferens.*

The other danger is that the idea of Nature, as the true guide to the making and interpreting of law, may lead to speculative vagueness, and that the identification of Nature with Morality may tempt the legislator or the judge into efforts to enforce by law duties best left to purely moral sanctions. This danger also the Romans escaped. They escaped it by virtue of their eminent good sense and their practical training. The lofty precepts of morality which they were fond of proclaiming, and which they sometimes declare it to be the duty of the lawyer to teach and of the magistrate to apply, had after all not much more to do with the way in which they built up the law than the flutings of the columns or the carvings on the windows have to do with the solid structure of an edifice. These decorations adorned the Temple of Justice, but were never suffered to interfere either with its stability or with its convenience for the use of men. In point of fact, the rules of Roman law, down to the age of Constantine, whose successors, wanting the sage advisers of an earlier day, tried some foolish experiments, furnish a model of the way in which moral principles should be applied to positive law. Though the Romans did not in theory draw any very clear line between the sphere of law and that of morals, they succeeded admirably in practice in keeping their moral zeal on the safe side of the line which divides the standard of conduct which the State may, and that which it had better not, try to enforce; while they certainly did impart to the law as it

left their hands a spirit of honour, good faith, and equitable fairness which modern systems have never surpassed, and which is in some respects higher than that of our own English law.

The Roman jurists of the first three centuries of the Empire were a unique phenomenon in the history of mankind, and they had a unique opportunity. They were at once the makers, the expounders, and the appliers of law. They worked for the whole civilized world. They were hampered by no meddlesome legislatures, for legislatures did not exist, and hardly at all by capricious monarchs, for the good Emperors encouraged them, while the voluptuaries, as well as the unlettered soldiers, left them alone. Their only restraint was that useful and necessary one which dwells in the deference of the wise for one another, and in the respect of the leaders of a great profession for the opinion of the profession as a whole. They were not indeed philosopher-kings in Plato's sense, but they were sufficiently imbued with the spirit of philosophy to value principle and to rise superior to prejudice. Accordingly they were able to do a work which has been of inestimable value for all time, since it has become, like the philosophical ideas of the Greeks and the religious ideas of the Semites, part of the common heritage of mankind. Rome is the only city to which it has been given to rule the whole of the civilized world, once as a temporal, once as a spiritual power. In both phases she welded the diverse and incongruous elements into a united body, whose elements, even when they had again been disjoined, retained traces of their former union. And on both occasions it was largely through law that she

worked, the ecclesiastical law of her later period being an efflux of the civil law of her earlier.

We have now traced the origin and growth of the conception of a Law of Nature in the ancient world, and have perceived how, having taken shape and received an ethical colour among the Greeks, it was turned to practical account by the Romans. It was not to them, as it has often been deemed by recent English writers, a purely negative and barren conception, nor was it wholly a destructive and, if the expression may be permitted, a ground-clearing conception. Doubtless a large part of its work was done in first undermining and finally overcoming the traditional authority of the old peculiar and usually cumbrous Law of the City (*ius quiritium*), which was often harsh and sometimes arbitrary. Another part was done in explaining old rules so as to amend their operation. But the conception of Nature as a source of Law was also a corrective and expansive force, not merely in sweeping away what had become obsolete, but also in establishing what was new and suited to the time. It found a solid basis for law in the reason and needs of mankind, and it softened the transition from the old to the new, first by developing the inner meaning of the old rules while rejecting their form, extracting the kernel of reason from the nut of tradition, and secondly by appealing to the common sense and general usage of mankind, embodied in the *ius gentium*, as evidence that Nature and Utility were really one, the first being the source of human reason, the latter supplying the grounds on which reason worked. Thus the idea of Nature, coupled with that of customs generally observed

by mankind, which embodied their experience, became a fertile and creative idea, which turned the law of a city into the law of the world, and made it fit to be a model for succeeding ages.

VII. The Law of Nature in the Middle Ages.

When the succession of Roman jurists as a professional class came to an end, and the level of culture in the whole community declined in Western Europe after the destruction of imperial power in the Western provinces, the ecclesiastics, among some of whom a tincture of legal knowledge remained, naturally identified the law of Nature with the law of God. We have this clearly expressed in the passages from Isidore of Seville (who wrote early in the seventh century) which obtained immense circulation and influence by being incorporated (in the twelfth century) in the introductory paragraphs of the *Decretum* of Gratian, the oldest part of the collected Canon Law. Isidore says[1]: 'All laws are either divine or human. The divine rest upon Nature, the human upon custom; and the latter accordingly differ among themselves, because different laws have pleased different nations.' Gratian himself, in the paragraph preceding, says: 'Mankind is ruled by two things, natural law and customs. Natural Law is that

[1] 'Omnes leges aut divinae sunt aut humanae. Divinae natura, humanae moribus constant, ideoque hae discrepant, quoniam aliae aliis gentibus placent. Fas lex divina est: ius lex humana. Transire per agrum alienum fas est, ius non est.'—*Dist. Prima*, c. i. 'Humanum genus duobus regitur, naturali videlicet iure et moribus. Ius naturale est quod in lege et evangelio continetur, quo quisque iubetur alii facere quod sibi vult fieri et prohibetur alii inferre, quod sibi nolit fieri. Unde Christus in Evangelio "Omnia quaecunque vultis ut faciant vobis homines, et vos eadem facite illis. Haec est enim lex et prophetae."' Here the Sermon on the Mount is taken as stating the Law of Nature.

which is contained in the law and the gospel, whereby every one is commanded to do to another that which he would have done to himself.' This identification, already suggested by the Stoics and by some of the Roman jurists themselves[1], was inevitable as soon as Christianity appeared on the scene. St. Paul, as we have seen, recognized a law written by God on men's hearts; St. Augustine speaks of the Eternal Law which governs the City of God. Nature—that is to say the Power that rules all things, the Force that is in all things—is, to a Christian, God; as St. Chrysostom says, 'when I speak of Nature I mean God, for it is He who has made the world[2].' The idea receives its final expression in Dante's identification of the Divine Love with the Force that pervades the universe—

'L'Amor che muove il sol e le altre stelle.'

Accordingly the scholastic philosophers posit a Law of Nature as being the work of God. St. Thomas of Aquinum introduces a useful distinction which exercised an enduring influence. The Eternal Law which governs all things is the expression of the Reason of God, the supreme Lawgiver. That part of it which is not revealed, but is made known to man by his own reason, may fitly be called Natural Law, as being the outcome of human reason, itself created and directed by the Divine Reason. Thus the sharing in the Eternal Law by a rational creature is Natural Law[3]. And so Suarez

[1] Cf. the citation by Marcian, in *Dig.* i. 3. 2, of the dictum of Demosthenes (*Adv. Aristog.* p. 774) *νόμος εὕρημα καὶ δῶρον θεοῦ*; and Justinian's *Institutes*, i. 2, § 11 'Naturalia iura, quae apud omnes gentes peraeque servantur, divina quadam providentia semper firma atque immutabilia permanent.'

[2] *ὅταν εἴπω τὴν φύσιν, Θεὸν λέγω, ὁ γὰρ τὴν φύσιν δημιουργήσας αὐτὸς ἔστιν.*

[3] *Summa Theologiae*, prima secundae, Q. xciv. 2.

says that the Law of Nature is in God the Eternal Law, and in men is the light which carries this eternal law into their souls, being applied by conscience.

I cannot here pursue an inquiry into the treatment of these notions by the scholastic theologians and philosophers, nor by their successors who belong to the school of the Catholic Renaissance in the sixteenth century, for the subject is a vast one. Neither have I space to deal with the students and teachers of the Roman Law during the thirteenth, fourteenth, and fifteenth centuries, of whom however it may be said that Natural Law has in their pages a less definite character than it bore to the ancient jurists, and is more coloured by that ethical atmosphere which they found in the treatment of it by Cicero and Aristotle and by such ecclesiastical authorities as Gratian and St. Thomas. It was during these centuries less widely and effectively used in the sphere of pure law than in those of speculation and actual political controversy. In these latter spheres it played a great part, being appealed to by the advocates as well of imperial as of papal pretensions, the one side claiming its support for the temporal, the other side for the spiritual potentate. All admitted that it stood above both these powers, and some maintained that where either power transgressed it, he might be lawfully resisted by his subjects[1]. Now and then princes put it forward as a ground for legislation. Philip the Fair of France, proposing to liberate serfs, says (A. D. 1311) that 'every human creature formed in the image of Our Lord ought

[1] On this subject see the authorities collected and luminously expounded by Professor Dr. Gierke in his *Johannes Althusius*, chap. vi.

by natural law to be free.' Now and then a jurist specifies matters in which it limits the legislator's power, as Baldus says, neither Emperor nor Pope could validly authorize the taking of usury[1]. But one can hardly say that the idea emerges as an independently formative power in the growth either of the Canon Law in Europe, or of the law of Islam in the East, for the obvious reason that ecclesiastical systems do not need it. The Bible in Christendom, the Koran where Islam ruled, supplied all the philosophical basis and all such indications of the Divine Will as were needed to give law a moral character. So, although the term is indeed frequently used by mediaeval writers of all types, it is generally used with a theological or ethical bearing. Nature, except in such a sense as was given to it by St. Paul, or in such expressions as were sanctioned by Aristotle or by the texts of the jurists, would have sounded strange, and might have savoured of heterodoxy. As the Chancellor says in the second part of Goethe's *Faust*—

> 'Natur und Geist! so spricht man nicht zu Christen:
> Desshalb verbrennt man Atheisten.'

Yet throughout this period the place which this conception holds and the function which it discharges in the world of thought, if not in that of practice, are of high import. It is an assertion of the supremacy of the eternal principles of morality, of the duty of princes to obey those principles, of the right of citizens to defend

[1] Gierke, *ut supra*. Baldus and other jurists declare that the Emperor 'tenetur ratione naturali, cum ius naturae sit potentius principatu,' and one goes so far as to hold him to be also bound by *ius gentium*. See Arthur Duck, *De Usu et Authoritate Iuris Civilis*, bk. i. chap. iii, § 12.

them, if need be even by rebellion or tyrannicide. It proclaims the responsibility to God of all power, whether spiritual or temporal, and the indestructible rights of the individual human being. Finding in the Divine Justice the ultimate source of all law, it imposes a restraint upon the force which positive law has at its command, and sets limits to the validity of positive laws themselves. Whether or no the individualistic spirit of the Teutonic races contributed to this remarkable change from the attitude of the Roman lawyers is a question I will not attempt to discuss. But it is clear that the influence of Christian teaching had, even under a dominant and persecuting ecclesiastical system, stimulated the vindication in the name of Natural Law of principles which are the foundation both of civil and of religious liberty.

VIII. The Law of Nature in Modern Times.

When the European mind, stimulated by Greek literature and by the ecclesiastical revolt of the sixteenth century, as well as by a group of coincident external causes, began to play freely round the great subjects of thought, a still wider career opened for this ancient conception. The history of that career, however, belongs to the domain of philosophy and of political science rather than to that of jurisprudence. Though it was chiefly from the Roman texts that the men of the Renaissance and Reformation eras drew their notions of Nature and natural law[1], and though the term

[1] The Romans had been content to derive law (see Essay X, p. 76) from the will of the people, whether expressed directly by legislation or tacitly by customs, and this doctrine continued to be enounced under the autocracy of Justinian much as it had been in Republican times.

ius gentium reappears as indicating the recognition of Natural Law by mankind at large, the speculations which these notions inspired turned largely upon such questions as the origin of law in general, a point which, as already observed, had not much occupied the Romans, and (still more) upon the source of authority and political power, and on the right of any constituted authority to demand obedience. The systems of the Middle Ages, which deduced the powers of the Pope from Christ's words to St. Peter, and the powers of the Emperor either directly from God or mediately through the Pope, and which found the source of all other spiritual and temporal power in some sort of delegation from one or other of these potentates, had now vanished, and thinkers were much concerned to find a new and sounder foundation on which to plant the Monarch and the State. Thus Nature came to play a new part: and presently there appeared theories regarding an original State of Nature, a conception not necessarily connected with that of the Law of Nature, yet one which has historically been closely associated therewith. This newly-invented State of Nature was neither the Golden Age of Hesiod, nor the *Saturnia regna* of Virgil, nor the brutish savagery (*mutum et turpe pecus*) of Horace. The man of the State of Nature was highly intelligent, and he was also highly self-assertive. In Hobbes he appears as in perpetual war with his fellows[1]; and that ingenious and uncompromising philosopher finds in this fact the basis of his theory of the State, holding that men, in order to get rid of their distracting

[1] With Hobbes compare the view of Spinoza, *Tractatus Theologico-Politicus*, cap. xvi.

strife, agreed with one another to surrender all their natural rights to get what they can for themselves by force into the hands of a Monarch, who thereby acquired a perpetual title to the obedience of all; the contract, since not made with him, being nowise dissoluble in respect of any misfeasance on his part. Locke, on the other hand, argues for a Natural Law which issues from Reason, is prior to all governments, and being superior to them entitles men to vindicate their natural rights against tyranny. With him, therefore, as with most thinkers of the seventeenth and eighteenth (and indeed also of earlier) centuries, Natural Law, being the offspring of Reason and the foundation of Natural Rights, is the ally of freedom. It is invoked, under the name of Natural Right, by the framers of the Declaration of Independence in 1776, and therewith enters the field of modern politics as a conqueror. Contemporaneously the doctrine was being spread over the Old World by Rousseau in his theory of the State of Nature and the Social Contract (first published in 1762): and it presently became the basis of the Declaration of the Rights of Man made by the French Convention in 1789.

The old theory had now developed into a destructive political force. Any one can see to-day that this revolutionary quality was always latent in it: the singular thing is that, unlike most revolutionary ideas, it should have kept the explosive element so long dormant. That which had been for nearly two thousand years a harmless maxim, almost a commonplace of morality, became in the end of the eighteenth century a mass of dynamite, which shattered an ancient monarchy and shook the European Continent. Liberty, Equality, Fraternity, are

virtually implied in the Law of Nature in its Greek no less than in its French dress. They are even imbedded in the Roman conception, but imbedded so deep, and overlaid by so great a weight of positive legal rules and monarchical institutions as to have given no hint of their tremendous possibilities.

Let us return from this glance at the political history of the conception to note three directions in which it has acted, in modern times, within the sphere of law proper.

The first of these is its action upon the law of England. Our system of Equity, built up by the Chancellors, the earlier among them ecclesiastics, takes not only its name but its guiding and formative principles, and many of its positive rules, from the Roman *aequitas*, which was in substance identical with the Law of Nature and the *ius gentium*. For obvious reasons the Chancellors and Masters of the Rolls did not talk much about Nature, and still less would they have talked about *ius gentium*. They referred rather to the law of God and to Reason. But the ideas were Roman, drawn either from the Canon Law, or directly from the *Digest* and the *Institutes*, and they were applied to English facts in a manner not dissimilar from that of the Roman jurists. The very name, Courts of Conscience, though the conscience may in the immediate sense have been the King's, suggests that moral element on which the Romans insisted so strongly; and the wide, sometimes almost too wide, discretionary power which Equity judges exercised, finds its prototype in the passages in Roman texts which refer to natural equity as the consideration which guides the judge in qualifying, in special cases, the normal

strictness of law. A passage in the remarkable little book called *Doctor and Student*, written by Christopher St. German early in the sixteenth century, observes that the term 'Law of Nature' is not much employed by English common lawyers, who generally prefer (it is remarked) to talk of the Law of Reason, and to say that such and such a rule is grounded in reason, or that reason points to such and such a conclusion. Nevertheless the author recognizes the Law of Nature or Reason as one of the three departments of the Law Eternal or Will of God, which is made known to man partly by Reason, partly by Divine revelation in the Scriptures, partly by the orders of princes or of the Church, having an authority derived from God. Some (it is added) say that all the law of England is part of the law of Reason; but St. German prudently doubts whether this can be proved. However, we have here another evidence of the influence of the old conception, and even, in the reference to a general Law of Nature shared in by unreasonable creatures ('for all unreasonable creatures live under a certain rule to them given by Nature, necessary for them to the consideration of their being'), a recurrence of the old notion countenanced by Ulpian, that the Law of Nature extends to the lower animals as well as to mankind. Nor are dicta of English judges referring to the Law of Nature wanting. Yelverton, under Edward the Fourth, says that in the absence of authority the judges 'should resort to the Law of Nature which is the ground of all laws.' And the law merchant, *i. e.* the customs commonly observed by traders of divers countries, is referred to as part of the Law of Nature by Lord Chancellor Stillington in

the same reign[1]. Here we have the old identification of *ius naturae* and *ius gentium* which was beginning in Cicero's days. Still later, the idea reappeared in the doctrine that as the Law of Nature is the foundation of all law, positive enactments plainly repugnant to it or to Common Right and Reason (an equivalent expression) ought to be held invalid. Dicta to this effect were delivered by Lord Coke and Lord Hobart, and were approved by Lord Holt; though little (if any) effect has ever been given to them. Similar references to the 'eternal principles of justice' as capable of overruling the acts of State legislatures may occasionally be gleaned from the reports of cases decided by American State Courts. Blackstone, repeating Cicero, declares that 'the Law of Nature is binding over all the globe in all countries: no human laws are of any validity if contrary to this[2]'; and he ascribes to 'natural reason and the just construction of law[3]' the extension which his contemporary, Lord Mansfield, gave to the enforcement of implied contracts[3]. So we find the Indian Civil Procedure Code of 1882 laying down that a foreign judgement is not operative as a bar if it is, in the opinion of the Court which deals with the question, 'contrary to natural justice.' But the chief practical applications in recent times of the ancient conception have, very appropriately, arisen where European judicial administration has been brought into contact with foreign semi-civilized peoples on whom the law of their European conquerors could not properly be imposed. Thus in British India the Courts have been

[1] I owe these references to Sir F. Pollock's Essay in *Columbia Law Review*, already mentioned.

[2] *Commentaries*, Introd. § 2.

[3] *Ibid.* bk. iii. chap. ix.

directed to apply 'the principles of justice, equity, and good conscience[1]' in cases where no positive law or usage is found to be applicable.

The second line of action is the part which the terms *ius naturae* and *ius gentium* played in the creation of International Law. That branch of jurisprudence has a twofold origin. It is due partly to customs which grew up among maritime nations in the course of trade, together with the usages and understandings which formed themselves in the diplomatic intercourse of States, partly to the doctrines thought out and delivered by a succession of legal writers, of whom the most famous are Hugo Grotius, Albericus Gentilis, Leibnitz, and Puffendorf. These thinkers, finding that large parts of the field of international relations were not covered by pre-existing custom, or that the existing customs were often discrepant, were obliged to seek for some general and permanent basis whereon to build up a system of positive rules. This basis could not be looked for in the laws of any State or States, because no such laws could have force beyond the limits of those States, and that which was needed was something which all States were to observe. Neither could it be expressly deduced from the Imperial Roman law, because the Romano-Germanic Empire had become a mere shadow of its former self, and the old Roman law, being the law of a State (though a World-State), did not contain all the necessary materials, not to add that anything imperial was in the earlier part of the seventeenth century re-

[1] See on this subject Sir C. P. Ilbert's *Government of India*, chap. vi. The expression 'equity and good conscience' in this connexion is as old as the Charter to the E. India Company of 1683; *ibid.* chap. i. p. 21.

garded with suspicion by Protestants. Accordingly, Grotius and his successors recurred to the Law of Nature as being, according to the theory of the ancient Roman jurists, a law grounded in reason and valid for all mankind. They used it copiously, and some of them called their writings 'Treatises on the Law of Nature and of Nations,' using the old phrase *ius gentium*[1] in what began to be taken as a new sense[2]. It was indeed their wish to represent this Law of Nature as being essentially a Law for the Nations, *i.e.* a law governing the inter-

[1] When he uses the phrase *ius gentium*, Grotius dwells on the fact that its force springs from the Will of the Nations which use it, and he observes that when it is ascribed to the will of all nations it is practically *ius naturale*, but that there is much of it which rests on the will, not of all, but only of many nations, since sometimes we find a *ius gentium* holding good in one part of the world which does not exist in other parts.

[2] Grotius, who (differing but little from the old schoolmen) defines the eternal and immutable Law of Nature as 'dictatum rectae rationis, indicans actui alicui ex eius convenientia aut disconvenientia cum ipsa naturali ratione inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut praecipi,' distinguishes from it the more arbitrary laws of God (*ius voluntarium*) which God may change, whereas He cannot change His own Natural Law any more than He can make two and two anything but four. In another place he observes that Human Nature itself is the mother of natural law, and (through contract) great-grandmother of civil (=positive) law. 'Naturalis iuris mater est ipsa humana natura, quae nos, etiamsi re nulla indigeremus, ad societatem mutuam appetendam ferret' (here repeating Aristotle), 'civilis vero iuris mater est ipsa ex consensu obligatio, quae cum ex naturali iure vim suam habeat, potest natura huius quoque iuris quasi proavia dici' (*Proleg.* 9. 16). He had just before said, 'Cum iuris naturae sit stare pactis, necessarius enim erat inter homines aliquis se obligandi modus, neque vero alius modus naturalis fingi potest; ab hoc ipso fonte iura civilia fluxerunt. Nam qui se coetui alicui aggregaverant, aut homini hominibusque subiecerant, hi aut expresse promiserant, aut ex negotii natura tacite promisisse intelligi, secuturos se id quod aut coetus pars maior, aut hi, quibus delata potestas erat, constituissent.' His *ius divinum voluntarium* is divided into that part which was delivered by God to all mankind at the Creation, after the Flood, and at Christ's coming, and that part which was delivered to Israel alone. It is therefore Revealed Law, and so different from the Law of Nature.

course of nations. There had in fact been always a close connexion between the two conceptions. For although the Roman jurists of imperial times had employed the term 'Law of the Nations' to denote, not the law applicable between nations, but a part of the law which was applied within the Roman dominions, still they had held their *ius gentium* to have been not only created by the customs of the nations of the world, but therewith also binding on nations generally, and to be indeed (save in some special points) a concrete embodiment of the law which Natural Reason gives to all mankind. Thus the name 'Law of Nature and Nations' became well settled; and it is only in our own days that the more precisely descriptive (if not quite satisfactory) term 'International Law' has, in superseding the older name, acquired a general acceptance.

Thirdly, the expression Law of Nature has, within comparatively recent times, obtained in Germany, France, and Italy, the meaning of the Philosophy of Law, that is to say, the metaphysical basis of legal conceptions and of the most general legal doctrines. Some observations will be found elsewhere in this volume [1] upon this *Naturrecht* or *Droit Naturel*, to which much labour and thought have been devoted by Continental writers, though very little by those of England or of the United States. Whatever value the works of these writers may have for metaphysics or ethics, they shed comparatively little light upon law in its proper sense. The study of Law in general seems nowadays likely to be practically useful chiefly on its concrete side, as what the Romans call a *ius gentium*, that is to say, as a

[1] See Essay XII.

collection and examination, a criticism and appraisement of the rules adopted by civilized nations on topics with which the legislation of all or most of such nations has to deal. In other words, Comparative Jurisprudence promises more fruit than abstract speculation on the foundations of law.

IX. Conclusion.

Except from the lips of the Continental theorists just referred to, we now seldom hear the term Law of Nature. It seems to have vanished from the sphere of politics as well as from positive law. A phrase which was, in the eighteenth century, a potent source of inspiration to some and a tocsin of alarm to others, is not now invoked by either of the two schools of thought which condemn, or seek to overthrow, existing institutions. The Social Democrats do not appeal to Nature, perhaps because they have realized that there never was a state of society in which all property was held in common by large organized communities, and perhaps also because they feel that so complex a system as they desire could not well be described as natural. Anarchists do not appeal to the Law of Nature, because their quarrel is with law altogether, and those among them who are educated enough to desire to find a philosophical basis for their doctrines are also educated enough to feel and honest enough to admit that history, which knows to-day far more about primitive man than she did a century ago, would afford no such basis in any state of nature she could possibly set before us.

Nevertheless the notion sometimes appears, and properly appears, in unexpected places. The British

Order in Council for Southern Rhodesia, of October 20, 1898, directs the Courts of that territory to be 'guided in civil cases between natives (*i. e.* Kafirs) by native law, so far as that law is not repugnant to natural justice or morality, or to any Order made by Her Majesty in Council.'

Whether this time-honoured conception has or will hereafter have any practical value for the modern world is a further question, but one for conjecture rather than discussion. We have seen what good work it did for the ancient world in breaking down race prejudices, and in particular for the Roman jurists in giving them a philosophical ideal towards which they could work in expanding and refining the law of the Empire. Nor should we forget that in later times it has sometimes stimulated resistance to oppression, and has corrected the tendency, always present among lawyers and in a ruling class, to defer unduly to tradition and to defend institutions which have become incompatible with reason, and hurtful to the common interest. This kind of work may not seem to be needed from the old idea in our own times. There is not much risk, either in Europe or in North America, that tradition will check reform, or that institutions will be respected and maintained merely because they exist. But our planet may expect, even according to the most pessimistic physicists, to last for millions of years. Who can say that an idea so ancient, in itself simple, yet capable of taking many aspects, an idea which has had so varied a history and so wide a range of influence, may not have a career reserved for it in the long future which still lies before the human race?

XII

THE METHODS OF LEGAL SCIENCE

Whoever, having heard the Roman law praised as a philosophical system, enters upon the study of it, and peruses either the *Corpus Iuris Civilis* or the writings of modern German civilians, will presently find himself asking, Where is the legal philosophy of the Romans to be found? By which of them is the subject treated in the abstract? Where are those general views on the nature and essence of law with which a philosophical treatment of it ought to begin? And where is that theory of the historical evolution and development of law which represents another method of treating jurisprudence in a scientific spirit?

There is scarcely anything answering to the student's expectations, either in the original Roman texts, or in those modern books wherein the scattered rules and maxims of the ancient jurists have been rearranged in systematic form. In the proem and introductory title of Justinian's *Institutes* and in the first few titles of his *Digest* may be found some few dicta, more sonorous than exact, about Justice and Nature and the origin of law. Nothing more in the *Corpus Iuris* nor in any other of the few old legal writings that have survived. There is no trace that any lawyer ever composed a treatise on that which we in England

call General Jurisprudence, and which the Germans call Rechtsphilosophie or Naturrecht (Philosophie de Droit, Droit Naturel). Cicero, who at one time intended to write a book on the civil law, throws out some remarks on the subject, but these are rather philosophical than legal, and it would seem either that no later philosopher, whether Greek or Roman, whether Academic or Stoic, followed in this path, or else that the treatises of those who did were not thought worthy of being preserved, or even of being quoted by the compilers of Justinian's *Digest*.

This absence of what the enlightened modern layman, though certainly not the professional English lawyer, expects in a refined and comprehensive system of jurisprudence, raises the question which those who approach the study of law, especially in a university, doubtless often put to themselves—Has the Roman law suffered from the want of a foundation of legal philosophy, or is that foundation really needless, and can a practically useful and scientifically symmetrical system of law exist without it?

In order to answer this question let us consider what is meant by the Philosophy of Law, or the Science of Law in general, conceptions to which it might be convenient to restrict the terms Jurisprudence (or General Jurisprudence) hitherto somewhat laxly used[1], and what are the proper relations of such a science on the one hand to a working system of law, and on the other hand to the principles and considerations which guide the legislator.

[1] As has been proposed by Dr. Holland in his admirable *Elements of Jurisprudence.*

Seeing that in each of the so-called moral or social or political sciences the essential characteristic is its method, and that it is by its possession of a method that its claims to be a science must be tried, we had better begin by inquiring what method or methods the science of law in general recognizes and applies ; and whether, if there be more than one, any one of these is entitled to be deemed the right method. As law is a science directed to practice, the test of rightness will evidently be the practical utility of the method in producing a system of law which shall be symmetrical, harmonious, and suited to the needs of the people whose social relations it has to adjust and regulate.

Four methods are commonly spoken of as employed in legal science, being the following :—

The Metaphysical or *a priori* method.

The Analytic method.

The Historical method.

The Comparative method.

This classification is doubtless open to criticism, but being in actual use, it may serve our present needs.

The Metaphysical method, which, without stopping to search for a definition, we may describe as being the method which most German, French, and Italian writers on the Philosophy of Law or the 'Law of Nature' have adopted, begins by investigating the abstract ideas of Right and Law in their relation to Morality, Freedom, and the human Will generally. It may thus be regarded as that branch of metaphysics, of psychology, of ethics, perhaps also of natural theology (according to the delimitation of these departments of inquiry which any one may adopt), which concerns itself with

the civil relations of men to one another in the most general and abstract form of those relations. It proceeds to deal with the fundamental legal conceptions or categories of the subject, such as Sovereignty, Obedience, Right, Claim, Duty, Injury, Liability, and with the notions involved in certain fundamental and universal legal institutions such as the Family, Property, Inheritance, Marriage, Contract, in each case endeavouring to discover the ethical or psychological basis of the conception or institution, and to build up the institution in its simplicity, purity, and perfection on that basis, determining the form which it ought to take—that is to say, which God or Nature designed it to take—in conformity to its essence and indwelling creative principle. In the language of Plato, it seeks to discover and describe the Idea (εἶδος) of the conception or institution. In particular, this method treats the notion of Right from all possible sides, connecting it with the Deity, with nature in general, with man's nature, with the family, with the primordial social and political relations of men, and endeavours in like manner to determine the conception of Duty and the essence of Moral Obligation, and the reasons why Obligation attaches to certain human relations, whether it springs out of these relations, *e.g.* out of those of the Family, or whether, coming from some other source, it gives to them a new moral quality. With certain philosophers the method extends itself to politics, and discusses questions some of which hardly belong to the legal sphere, *e.g.* the rights of majorities as against minorities; the grounds on which a ruler may demand submission, or those on which subjects may properly

resist or depose a ruler; the relations of civil authority to ecclesiastical authority, and the limits within which, in case of conflict, obedience is due to one or to the other, perhaps even the limits within which the legislator may fitly enforce duties primarily moral.

The writers who have followed this method may be divided into two classes. Some remain in the field of abstractions. Positing a few extremely general ideas or principles, they develop out of these by way of deduction or explication the rest of their doctrine down to such legal details, usually scanty, as they condescend to give. The whole system is, or seems to be, spun out of the author's fundamental conceptions. Others, while using abstract terms with equal boldness, turn out when closely scrutinized to have really drawn their notions from the concrete, and to be merely generalizing from phenomena, more or less numerous, which they have seen or heard or read of. Obviously, even the more professedly abstract writers of the former class do in fact found themselves largely, often more largely than they fancy, upon observation, for this no man can help doing, however much he may prefer the 'high *priori* road.' There is, however, a marked difference between the way in which this method is handled by different types of thinkers. Some soar so high through the empyrean of metaphysics that it is hard to connect their speculations with any concrete system at all. Others flutter along so near the solid earth of positive law that we can (so to speak) see them perching on the stones, and discover the view they take of the questions with which the practical lawyer or legislator has to deal.

The worth of the books, abundant on the Continent of Europe but scarce in England and the United States (though a little less scarce in Scotland), which have been composed by writers of this school, will be estimated differently by those who enjoy speculation for its own sake, and by those who think it a waste of time unless it bears fruit in truths of definite practical utility. If the latter criterion of value be accepted, the importance of these treatises cannot be placed very high. The foliage is luxuriant, but the fruit scanty. A vigorous and ingenious mind will doubtless, in whatever way he may treat the subject, stimulate thought in the student, and will probably throw out just and suggestive remarks which may be treasured up as practically helpful. As some brilliant thinkers, at the head of whom stand Immanuel Kant and G. W. F. Hegel, have adopted this method in handling the Philosophy of Law, and have given a powerful impulse to many able disciples, it would be foolish and presumptuous to disparage their treatises. Nevertheless, the general conclusion of English lawyers has been that not much can be gathered from lucubrations of this type. They are decidedly hard reading; and the harvest reaped is small in proportion to the time spent. Threading its way through, or, as some would say, playing at hide-and-seek in, a forest of shadowy abstractions, this method keeps too far away from the field of concrete law to throw much light on the difficulties and controversies which the student of any given system encounters. Nevertheless, while this is the general character of the school, there are some books referable to it wherein one finds legal conceptions analysed with an acuteness which cannot but

sharpen the reader's wits, and others which pile up much ingenious and subtle thinking round the points where law and ethics come into contact, some legal problems being really ethical problems also. Even a student who has experienced many disappointments will not lightly abandon the hope that some lawyer with a gift for speculation will one day employ this method—in itself a method with legitimate claims to respect—to produce a book nearer to the realities of the subject than any which the last two centuries have seen. There is more to be expected from such a man than from a metaphysician who thinks he understands law. Higher and rarer gifts are no doubt needed for metaphysics than for law; indeed even high poetic genius is not so rare as a really original genius for speculation. But the lawyer who rises into metaphysics has at any rate his body of practical knowledge to keep him in the path of sense: the metaphysician dealing with law may easily lose himself in mere words.

The Analytic Method, standing in a marked and sometimes a scornful opposition to the method we have been considering, leaves metaphysics and ethics on one side, and starts from the concrete, that is to say, from the actual facts of law as it sees them to-day. It takes the terms, whether popular or technical, which are in current use. It endeavours to define these terms, to classify them, to explain their connotation, to show their relation to one another. It is of course frequently obliged, when it attempts, as it must attempt, to be logical, to modify the existing terminology, and attach a new specific and technical sense of its own to some words, or even to invent terms altogether new.

This method, though it is essentially, in its more obvious and rudimentary form, so much a matter of common sense as to have been more or less employed by all who have thought or written about law, and may possibly have been used in Egypt under the Fourth Dynasty, is most familiar to us as that employed with boldness and spirit by Jeremy Bentham, and subsequently proclaimed by the school he founded to be the only helpful mode of handling the subject. That school rendered a service to legal study in England by the keen east wind of criticism which they unloosed to play upon our law, and which ended by uprooting a good many old and probably rotten trees. They roused an interest in the discussion of general legal doctrines which had been wanting during the first three quarters of last century. But they fell into two grave errors.

They laid the foundations of legal science in the so-called Theory of Utility, which, be it sound or unsound, has nothing to do with the Analytic Method, nor with Positive Law. In the first place, it is a theory of human action which properly belongs to ethics or psychology; and secondly, in so far as it can be deemed to affect law, it affects neither the classification and exposition, nor the application of law (except in so far as it may subserve interpretation), but the making of law. That is to say, it belongs not to the jurist but to the legislator. Its place is that of a practical guide to the science we call the Principles of Legislation. But in this application it is no new discovery, for all legislators have at all times professed, and many have honestly sought, to be guided by it. Expediency, to use the older and less formal term, is a principle

obvious in legislation and dangerous in law, for though the commentator may properly use it, the judge may readily abuse it. That Bentham, who was first and foremost a reformer, should incessantly insist on the doctrine of utility, till he almost crushed his legal analysis under the weight of his ethical theory, was perhaps natural. He was really trying to create a Theory of Legislation. But John Austin, the most prominent of his professional disciples, was a writer on law rather than a reformer, so in him the fault is less excusable. Indeed, Austin pushed the habit further, for he must needs, after basing Law on Utility, identify Utility with the Law of God, in doing which he wanders off into the field of Natural Theology, and virtually repeats the error, which he had censured in the Roman lawyers, of assuming a Law of Nature as the basis of legal doctrines. So that Bentham and he are not unjustly described by the Germans as the authors of 'theories of Natural Law.'

The second error of this school was that of relying too much upon current English notions and terms. They did not extend their view far enough either into the past, or over the legal systems of other times and countries. Bentham was, to be sure, chiefly occupied with schemes of reform, and did not profess to be a jurist. Austin deserves credit for having gone to Roman law, and sought in it those general ideas in which he found, or thought he found, English law lacking. Unfortunately he did not fully master the Roman system; and his overweening self-confidence betrayed him into a dogmatic censoriousness which was unbecoming even when he was exposing the

errors of Blackstone, and was still less pardonable when he poured scorn on the legal luminaries of Rome. He did not perceive how deep some of the difficulties of legal theory lie, nor that there are some conceptions which it is safer to describe than to attempt to define. Hence his solutions are sometimes crude, and his efforts, in themselves most laudable, after exactitude, are apt to fail for want of subtlety. On several fundamental questions, such as the origin and essence of law and the nature of sovereignty, Austin is palpably wrong, and the most eminent of those later writers who started as his disciples have been largely occupied in disclaiming and correcting his mistakes.

The really great merit of the English Analytic School —a merit which was no doubt the main source of its influence, but which we are now in some danger of forgetting—was its destructive energy. When Bentham began his career, case law, which reigned supreme, was by the legal profession generally, though of course not by such a man as Lord Mansfield, regarded as a mere string of precedents. No idea of philosophical arrangement, much less of literary finish, had begun to work upon the mass—

> 'Quum neque Musarum scopulos quisquam superarat,
> Nec dicti studiosus erat.'

Blackstone had indeed rendered the immense service of presenting within moderate compass and in graceful diction a complete view of the law. But he brought an insufficient grasp of history and philosophical principle, and still less an exact analysis, to his exposition, finding little to criticize and nothing to require amendment in

rules and a procedure which half a century later few ventured to justify. This genial optimism, which was satisfied with any explanation, because it took the law as it stood to be the best possible, provoked Bentham. He writes with the air of one who does well to be angry; and the tradition descended to Austin, by whose time the grosser scandals of the law were beginning to be removed.

Between Bentham and Austin there is one conspicuous difference[1]. Bentham had not only a vigorous but a fertile and inventive mind, acute and ingenious, if sometimes warped or liable to become what is now called 'cranky.' He drops plenty of good things as he goes along. Austin is barren. Few or no suggestive thoughts are to be gathered where he has passed. His dry, persistent iteration, with its honest struggle after precision of terms, has a certain value as a mental discipline, just as it tests one's powers of endurance to traverse a stony and waterless desert. An old Scottish lady consoled her friend, who had been dragged two miles in a broken carriage by runaway horses, with the remark that it must have been a precious experience. But it is generally better to get one's discipline from books which also yield profitable knowledge. Of this there is in Austin nothing which may not nowadays be found better stated elsewhere. Most recent authorities are now agreed that his contributions to juristic science are really so scanty, and so much entangled with error, that his book ought no longer to find a place among those prescribed for students.

[1] Some excellent remarks on the intellectual characteristics of Bentham may be found in Mr. Leslie Stephen's *English Utilitarians*, vol. i (1901).

How then, it may be asked, did it happen that Bentham and even Austin made a great impression upon some powerful minds in the last generation? Bentham did, because he was the first man who had the courage to denounce the artificialities, absurdities, and injustices of the unreformed law and procedure of England. No small part of the credit for the reforms which Romilly, Brougham, and their fellow workers carried out belongs to the man who had begun to call for them full thirty years before. Austin did, because in his time systematic legal study, and in particular legal education, were almost extinct in England. There was no legal teaching either in the old Universities, or in London. Though the grosser abuses of procedure had been removed, yet the subtleties of special pleading, as well as the long-winded and highly artificial intricacies of conveyancing, still flourished, and the law was regarded as a forest of details through which it was useless, even if possible, to drive paths for the student to follow. A disciple of the old reformer who brought to the novel enterprise of teaching and systematizing law a faith in the reformer's doctrines and a zeal for general principles, not unnaturally received the sympathy and the deference of the eager youth who believed, and rightly believed, that the practice of the law, as well as its substance, would gain from the application of an independent and fearless criticism to it. By this service Austin has earned our gratitude, and deserves to be remembered with respect. So, though the legal writings of Bentham and his disciples have now only a historical interest, we must not forget that they stimulated men to handle law in a new spirit, and that those whom

they influenced had much to do with the establishment of the modern schools of law and the introduction of new methods of preparation for professional work.

The third method is the Historical. Instead of taking law as a datum, like the two other previous methods, it seeks to find how law sprang up and grew to be what it is. It sees in law a product of time, the germ of which, like the germ of the State, exists in the nature of man as a being made for society, and which develops from this germ in various forms according to the environing influences which play upon it. Although law may not have been created by the State, it tends as it grows to become more and more closely associated with the State as a function of the latter's energy. Though its leading doctrines and its fundamental institutions are in some respects essentially the same in all civilized communities, still every given system is, in the historian's view, for ever changing, growing, and decaying, both in its theory and in its substance, *i. e.* both in the ideas which create and underlie the legal conceptions and rules, and in the particular forms which those rules have assumed no less than in the institutions by which such rules are put in force.

The utilities of the Historical Method as applied to any given system of law are two.

It explains many conceptions, doctrines, and rules which no abstract theory or logical analysis can explain, because they issue, not from general human reason and the nature of things, but from special conditions in the country or people where the law in question arose. All law is a compromise between the past and the present, between tradition and convenience. Hence

pure analysis, since it deals with the present only, can never fully explain any legal system.

This is not to say that the Historical method is a mere record of accidents. On the contrary it endeavours to eliminate, or at least to reduce to due proportions, that element of accident which results from the personal fancies and arbitrary volition of individual lawgivers. It conceives of national character and the circumstances of national growth as creative forces, whereof law is the efflux and expression, being itself a living organism, which in its turn helps to shape the mind of the people. Accordingly it shows that each nation, rather than individual men, however potent, is, through what the Germans call its Legal Consciousness (*Rechtsbewusstsein*) the maker and moulder of its law.

A second merit of this method is that of indicating that the conceptions and rules which prevail at any given time, however obviously reasonable and useful they may appear to the generation now living, will not always appear so, but must undergo the same change and decay which previous rules have experienced. It teaches us never to condemn the past because it is not the present, nor ever to forget when we praise the present that it too will some day be the past. This is one of those truisms which men are always forgetting to apply, and of which legislators in particular need to be often reminded.

The risk principally incidental to the Historical method is, that it is apt to lapse, either into mere antiquarianism on the one side, or into general political and social history on the other. Some charge it with retarding improvement by justifying the past. Those who

oppose reforms have often so abused it: just as those abuse it who when they palliate crimes by dwelling on the 'so-called conditions of the age' attenuate all moral distinctions. 'In judging Phalaris,' a modern lecturer is reported to have said, 'we must not forget that the moral standard of Phalaris' time is not that of our own.' Nevertheless History, when she explains and is supposed to justify the past, justifies it as the past, and must not be deemed to defend it for the purposes of the present.

It is, however, a weak point in the Historical method as applied to the science or philosophy of law that it is more applicable to the law of any particular country than to the theory of law in general, for the details of legal history vary so much in different countries that immense knowledge and unusual architectonic power are needed to combine their general results for the purposes of a comprehensive theory. Indeed, I doubt if any man of the requisite capacity (unless perhaps Rudolf von Ihering) has yet produced a treatise on jurisprudence or the philosophy of law by means of this method. The thing, however, may be done, and so will doubtless be done some day. Everything happens at last.

Lastly, there is the so-called Comparative Method, which is the youngest of the four. It is concerned with space as the Historical method is with time. It collects, examines, collates, the notions, doctrines, rules, and institutions which are found in every developed legal system, or at least in most systems, notes the points in which they agree or differ, and seeks thereby to construct a system which shall be Natural because

it embodies what men otherwise unlike have agreed in feeling to be essential, Philosophical because it gets below words and names and discovers identity of substance under diversity of description, and Serviceable, because it shows by what particular means the ends which all (or most) systems pursue have been best attained. The process is something like that which a Roman Praetor might have followed in constructing the general or theoretical part of his *ius gentium*[1]. If indeed we are to suppose the Praetor ever really did study the laws of the various neighbours of Rome, he was one of the founders of this method, though to be sure the Roman commissioners, who are said to have been sent out to examine the laws of other countries before the Decemviral legislation, preceded him in this attempt.

The comparative science of jurisprudence appears, however, in two forms. One of these must, like the science of comparative grammar, crave the aid of history, for the study of the differences between two systems becomes much more profitable when it is seen how the differences arose, and this can be explained only by social and political history. This form may be deemed an extension of the historical method, which it resembles in helping us to disengage what is local or accidental or transient in legal doctrine from what is general, essential, and permanent, and in thereby affording some security against a narrow or superficial view. It is really an historical study of law in general; and, like history, it is not directed to practical ends.

[1] See Essay XI, p. 130 sqq.

The other form, though it cannot dispense with the aid of history, because the differences between the laws of different countries are not explicable without a knowledge of their sources in the past, has a narrower range in time, being directed to contemporary phenomena. It has moreover a palpably practical aim. It sets out by ascertaining and examining the rules actually in force in modern civilized countries, and proceeds to show by what means these rules deal with problems substantially the same in those countries. For example, it takes such a topic as the liability of an employer for the acts of his servant, or the structure and management of incorporated companies, compares the enactments it finds in France, in Germany, in the British Colonies and in the States of the American Union, points out their differences, and seeks to determine which mode of handling the difficulties of the subject is the simplest and most likely to work well in practice. The next step would be to test each legislative experiment by the results it has secured in each country. Here, however, the task becomes more difficult, and requires qualities in the investigator which are not altogether those needed by the jurist.

What the Comparative method does for legal training and legal theory it does in its first mentioned and historical form. Ample as the materials may appear, they are really somewhat scanty, because there have been in the world not many distinct types of legal system or doctrine, and few of these have reached a high development. Of the ancient and long since departed systems little is left, and that little not very helpful for this particular purpose. There are some fragments of old Celtic law

from Ireland, with larger fragments of old Teutonic law chiefly from Iceland, Norway, Friesland, and the Carolingian Empire, some old Slavonic land and family customs, besides what may be gleaned from the ancient books of India, and what has recently been discovered in Egypt, in the clay tablets of Babylon, and in inscriptions among the ruins of Greek cities. Of the modern systems, on the other hand, there are besides those of Teutonic origin, practically only three worth mentioning: Hindu law, which has been fully developed only in two or three directions; Muhamadan law, which is deficient on some of the sides we should deem the most important; and the Roman law, which now covers all those parts of the civilized world that are not covered by English law, including the continent of Europe and the colonies of European nations (some British colonies as well as French, Dutch, German, and Portuguese) except those which lie in the temperate parts of North America and in Australasia. So far, therefore, as the doctrines of law in its civilized and developed forms, suited to a progressive modern nation, are concerned, the comparative method is virtually restricted to a comparison of English and Roman conceptions and rules. And the fundamental ideas and principles of English law itself have been in some departments so much affected by Roman law that they can hardly be treated as independent material for comparative study.

It is when we leave the field of legal philosophy and jurisprudence in general for the field of particulars and details that the practical value of the Comparative method begins. An examination of the various ways in which economic and social problems have been dealt

with in recent times, and in which commerce has been regulated and crime checked, is in the highest degree interesting and useful. But that is not quite the kind of legal study which we are here primarily engaged in considering. No doubt the way in which questions of liability and responsibility and negligence, to take a familiar example, are dealt with in the laws of different countries, does throw light upon general juristic conceptions and upon the lines which Courts ought to follow in developing these difficult branches of any concrete system. But on the whole, it is rather to the province of legislation than to that of law that this part of comparative jurisprudence belongs; and, as has been already observed, the utility for practical guidance of the results which an examination of the legislation of various civilized states supplies is somewhat reduced by the difficulty of determining how much of those results, be they good or evil, is in each case attributable to legal enactments, how much to the social and economic environment in which the enactments work.

If we are to attempt to estimate the respective worth of these four methods for the creation of a theory or philosophy or science of law, we must begin by settling for whom such a science is designed and to whom it will be useful.

Three kinds of persons will primarily and directly profit by having such a science built up on the best lines, viz. the teachers and students of law, the practitioners of law, including both advocates and judges, and the makers of law, *i.e.* legislators and draftsmen. Legislators, however, whether monarchs or members of legislative assem-

blies, have in modern countries seldom sought to acquire any specifically legal knowledge, though some persons who sit in the legislatures of modern countries usually happen to possess it. Thus it is rather of the two other classes we must think, that is to say, of the value of a scientific theory for facilitating the acquisition of legal knowledge by the learner, and of its value in helping the practitioner (whether advocate or judge) to apply it with accuracy, perspicacity, ingenuity, and promptitude. In proposing this test I do not mean to ignore the importance which belongs to the philosophy of every great branch of learning, as an end in itself, apart from all practical benefits to be derived from it. That importance is, however, as the Romans say of freedom, *res inaestimabilis*, a thing too precious to receive a valuation in any recognized currency. Practical utility, on the other hand, can be tested and valued, so it is to the practical utility of this science in making men thorough masters of law that we had better confine our view.

All the four methods are legitimate and capable of being applied in a truly scientific spirit. None therefore is to be either neglected or disparaged. If, however, we judge them by their fruits, we shall find that the Historical has given the best crop. The Metaphysical tends to be not merely abstract but vague and viewy. Of the treatises in which it has been employed the best are indeed not to be deemed empty. Scattered through not a few of them one finds acute and suggestive remarks. They subserve a sound analysis by their treatment of ethical problems: and sometimes they present what are really considerations of practical expediency disguised in the robes of

sacerdotal transcendentalism. The difficulty which forbids many among us to give more study to these books is the shortness of life. Much talent, sometimes of a high order, has gone to the making of them. But they are, and not solely the German ones, terribly hard reading.

The Analytic method keeps much nearer to the realities of law, and is serviceable for the clarifying of our ideas. Its English votaries have, however, generally wanted breadth of view, and have tried to force definitions on facts, instead of letting the facts prescribe the definition. They have been unequal to the subtlety of nature (for law also is a product of nature), and this largely because they have neglected the materials for induction which history supplies.

The Comparative method (as already observed) suffers from a lack of material for the purposes of a philosophy of law in general, and becomes in practice an examination of Roman conceptions with the help of light from England in those departments of English law which have been least influenced by Rome[1], and of some glimmers from the East and from the laws of ancient European peoples.

The Historical method, on the other hand, may at least be relied upon to give us facts. Facts are always helpful, when men have been trained to use them. It is the business of historical criticism to impart this training, just as it is the business of logic to teach men how to analyse a current conception and to distinguish the various senses in which a term may be used.

[1] An example of how stimulating this may be made is furnished by the treatment of Possession in the acute and learned lectures on the Common Law of Mr. O. W. Holmes (now Chief Justice of Massachusetts).

If the question is propounded—How should these four methods, or some or one of them, be used for the purpose of legal instruction and the formation of a legal mind and power of handling legal problems, may we not answer it in some such way as the following?

The philosophy or theory of Law should begin by determining the place of law among the human or moral as opposed to the physical sciences, and should examine its relations to Psychology, Ethics, Politics, and Economics. As this inquiry will start from a general survey of the nature of man and the general ideas he forms, it will fall within the scope of what we have called the Metaphysical method.

The notions and conceptions which are essential to law and lie at the bottom of all systems will then be investigated, and particularly the following fundamental conceptions—Right, Obligation, Duty, Liability, Law, Custom. Some will prefer to deduce these conceptions by the metaphysical method from the phenomena of human nature and the principles that connect these phenomena. Some will prefer to start from current notions as embodied in current language, and to reach correct definitions by analysing the meaning conveyed by each term and setting out the facts it is intended to cover. Whichever method be adopted—and there is less real difference between the two than the description here given of them might seem to convey—the Historical method ought to accompany and aid the application of either. For although the object of the inquiry is to obtain a statement which shall be adequate and exact for the science of law as a fully developed product of civilized societies, we always need to be warned by History

against assuming that our present notions are sufficiently wide, and sufficiently possessed of the elements of necessity and permanence to secure that our propositions shall be generally true and enable our definitions to hit what is really essential. The once popular definition of law as a Command of the State is an instance of the danger of forgetting the past, for the fact that it would have been palpably untrue in certain stages of political development shows that it does not rest upon a sufficiently broad foundation.

From these general conceptions the inquiry will advance to a second order of ideas and categories, more specifically and purely legal, such as Ownership, Possession, Contract, Tort, Marriage, Guardianship, Slavery, Conveyance, Pledge, Lien, Prescription, Inheritance, Sale, Partnership, Bailment, Crime, Fraud, Negligence. Here we come still closer to the rules of concrete systems. A German metaphysician may no doubt deduce the abstract idea of Ownership or Contract from the general principles he has previously laid down in his speculative treatment of the subject. A Socratic analyst may by testing current terms and phrases, and unfolding the meanings involved in these terms, arrive at definitions of them. But the examination of the conceptions and the definition of the terms must be mainly based on a study of the facts which in one or more actual legal systems these conceptions cover. In this study the Historical method can render effective help, because the rules actually regulating in any given system all the relations denoted by these terms are sure to have something irregular or apparently arbitrary about them, something which pure reason

would not have suggested. The forms, for instance, which Possession, Inheritance, and Pledge have taken both in Roman and in English law have many peculiarities explicable only by tracing the causes that produced them. The definition which the jurist will propound for the purposes of his science of law in general will avoid such peculiarities, but he cannot afford to be ignorant of them or of their origin, else he may miss some side of their significance.

Although in theoretical Jurisprudence the part of History is on the whole secondary, it is nevertheless indispensable. For History shows us cases where things that are really different go by the same name, and other cases where things that are really the same go by different names, cases where a rule has been extended beyond, and others where it has not been extended to, its proper or natural range, and thus it guides the jurist, explaining the facts on which he has to found his theory. The Comparative method renders a similar service in preventing him from laying too much stress on the special shape in which a doctrine or institution appears in the particular system whose history he is studying, and generally in pointing out identity of substance or effect coupled with diversity of form or expression.

All the above-named categories or conceptions or institutions, together with some few others of minor importance, belong to the science of law in general, because they appear in every fully developed system. When, however, we get more into particulars, it becomes increasingly difficult to lay down general doctrines or suggest general rules applicable to all communities,

because details must be settled with reference to the needs and usages of a given community, and that which suits one would hardly suit another. Here therefore the Philosophy or Science of Jurisprudence will bid farewell to the student, handing him over to those who teach the law of England or Scotland or France or Russia, as the case may be, and bidding him remember to apply the general principles he has mastered to the criticism of the details which he will thenceforth be occupied in learning.

The principles which constitute the Science or Theory of Law in general can be adequately stated within moderate compass. The subject is not a large one, unless a writer spreads himself out in ethics on the one hand or accumulates historical details on the other. Nor is it in the knowledge to be given that the value of the study will chiefly lie; it is rather in the training to use the right methods in the right way. Before he is plunged into details, the student ought to acquire the habit of looking for principles, of analysing terms, of perceiving that legal doctrines have all had their growth from rude beginnings and will change further. These aptitudes will serve him when he enters the domain of technical law, which is a domain less of Reason than of Authority. And authority, though it may be called the reason of the past, rules not because it is reason but because it has the sanction of a past pronouncement.

Arguments founded on the reason of things or on the tendency of historical development will avail nothing in practice against a positive rule, whether contained in a statute or deducible from a decided case. Seldom

indeed will a judicious advocate invoke either Reason or History, unless perhaps in arguing before the House of Lords a point whereon little authority exists. But in reasoning from decided cases, and even in interpreting statutes, his mastery of the methods already described will stand him in good stead. Nor is it to be forgotten that the judge and the writer of text-books have, each of them, important functions in guiding the development of the law. When a question is to be dealt with regarding which authority is scanty or the decisions are conflicting, a jurist belonging to either of these classes may apply the philosophic habit of mind formed by his theoretic studies to the task of finding a solution which shall be sound and durable, because conformable to principle, and standing in the true line of historical development.

Let us return, now that we have sketched a scheme for a Theory or Science of Law in general, to the question whence we started, whether the Romans, who never produced any such theory or science, suffered from the want of it. If they did suffer, why do we praise their treatment of law, and why in particular do we call it a philosophical treatment? If they did not suffer, what becomes of the importance of a Science or Theory to the modern lawyer? Why should he trouble himself about it at all?

What is it which we admire in the Roman jurists, and in the Roman law generally?

The characteristic merits of the Roman law—and I speak of course only of the Private Law, for Public or Constitutional Law must be considered apart—are its Reasonableness and its Consistency. It is

pervaded by a spirit of good sense. Except in two departments, those of the Paternal Power and of Slavery, its rules almost always conform to considerations of justice and expediency. Very little needs to be excused as the result of historical causes. Even Slavery and the *Patria Potestas*, the former universal in the ancient world, the latter so deep-rooted among the Romans that it could never be altogether expunged, are in the later centuries so steadily and carefully mitigated that most of their old harshness disappears. The moral tone of the law is, take it all in all, as high as that of any modern system; and in some few points higher than our own. By its Consistency I mean the harmony and symmetry of its parts, the maintenance through a multiplicity of details of the leading principles, the flexibility with which these principles are adapted to the varying needs of time, place, and circumstance. So the excellence of the jurists resides in their clear practical sense, in the air of enlightenment and of what may be called intellectual urbanity which pervades them. Most of them express themselves with a concise neatness and finish which gives us the pith of their view in the fewest and simplest words. They dislike what is arbitrary or artificial, taking for their aim what they call elegance (*elegantia iuris*), the plastic skill (so to speak) in developing a principle which gives to law the character of Art, preserving harmony, avoiding exceptions and irregularities. Yet they never sacrifice practical convenience to their theories, nor does their deference to authority prevent them from constantly striving to correct the defects of the law as it came down from their predecessors.

In these respects the Roman law and the Roman lawyers of the classical age (the first two and a half centuries of the Empire) may be deemed more philosophical than our own law or its luminaries. Our law, equal to the Roman in its sense of justice and in its subtlety, and in some respects distinctly superior to the Roman, is also a far larger and more complex structure, as it has to regulate a far more complex society. But it has less symmetry and consistency, more intricacy and artificiality, than the Roman: and few of our legal writers can be placed on a level with the greatest of the classical jurists. Compare Lord Coke for instance, or Lord St. Leonards, with Papinian or Gaius. Lord St. Leonards was a man greatly admired by the profession, and his books secured an authority unsurpassed, if indeed equalled, by any other legal writings of the century[1]. His knowledge was immense, and it was minute. His treatises show the same acuteness and ingenuity in arguing from cases which his forensic career displayed. But these treatises are a mere accumulation of details, unillumined and unrelieved by any statement of general principles. In literary style, and no less in the cast and quality of his intellect, he is harsh and crabbed, but his frequent obscurity must

[1] Lord Mansfield in the eighteenth century or Lord Cairns in the nineteenth, perhaps the two most philosophical minds that have adorned the English bench, would doubtless, if they had written on law, have shone as legal writers far more than Lord St. Leonards; and it is of course true that in order to have a fair comparison our great judges ought to be thrown into the English scale. But the form in which their wisdom appears makes it less available than the form in which we have that of the Romans. So too Lord Justice Mellish, the most solid and cogent reasoner of his time, and Lord Bowen, the most subtle and ingenious, would doubtless have produced admirable work had not their time been absorbed by their forensic and judicial duties.

be due less to a want of clear thinking than to the fact that our legal text-books have so rarely aimed at excellence of literary form that this famous case-lawyer had no ideal of lucidity or finish before him. Lord St. Leonards is not an exceptional instance. That sound and very learned legal author whom the early Victorian era so much valued, Mr. John William Smith (Smith's *Leading Cases* and *Contracts*), illustrates the same tendencies.

Now the merits we have noted in the Roman law and the Roman jurists are largely merits of method. To set forth the causes to which the excellence of the Roman law is ascribable would involve a long digression, and I have dealt with those causes elsewhere. So let us confine ourselves to the jurists. They reason and they write as men who have been thoroughly trained, who have been imbued with a large and liberal view of law, who have philosophy and analysis and the sense of historical development equally at their command. They are endowed in fact with the qualities which, as we have been led to think, a course of the Theory or Science of Law ought to impart. How then did they acquire these qualities?

First, by the study of philosophy. Though our data scarcely justify a general statement, it seems probable that many of the jurists, especially of such as grew up at Rome, received instruction in Greek philosophy. It has been suggested that not a few professed the doctrines of the Porch. Anyhow the conception of Nature as a force or body of tendencies prompting and guiding the progress of law was familiar to them, and appears to have influenced their ideas. Then by a searching and sifting

of legal terms and maxims, what may be called an exetastic method, they sharpened the edge of their minds and gave clearness to their notions. Both the philosophical and the rhetorical training given to young men fostered the habit of analysis; and the disputations which went on among the lawyers, stimulated by the controversies of the two great schools, Sabinians and Proculians, doubtless trained men in dialectic, wherein the framing and the dissecting of definitions play no small part. The history of law does not seem to have been taught, and regarding some parts of their earlier legal history the Romans of the later Empire may have known less than we know to-day. The sketch taken from Pomponius which we have in the beginning of Justinian's *Digest* is uncritical, and in many points defective. But these jurists, from their study of the development of equitable principles through the action of the Praetor, had a training in historical method which must have been eminently profitable. During the last two centuries of the Republic and the first century of the Empire, the law of Rome was being constantly amended and developed far less by the comparatively rough method of legislation than by the delicate methods of interpretation, discussion, and the issuing of praetorian Edicts, and developed in such wise that the new had always arrived before the old departed, so that the process of evolution was always before their eyes, and its lessons familiar to them.

Finally, the administration of justice by the *Praetor peregrinus*, who doubtless based himself mainly upon the commercial usages of the merchants who from various quarters resorted to Rome, and still more

the issuing of provincial edicts by the magistrates who were sent to rule the provinces according to systems which combined some Roman rules and principles with other rules which belonged to the particular province, supplied abundant materials for observing in what points the special and peculiar law of Rome agreed with or differed from the laws of other peoples and states[1]. The jurists were thus led, not by theory, but by the practical needs of the case, to apply and to profit by the Comparative method, no less than by the three other methods above enumerated. And accordingly they did in fact obtain, without any paraphernalia of a Philosophy or Science embodied in separate treatises or ostentatiously taught as a separate subject, those very gifts and aptitudes which a systematic and enlightened scheme of legal education ought to confer. They did not set out with abstractions, like our German and Scottish friends. They did not, like Bentham and Austin, crack a set of logical nuts, in the effort to divide and define the matter and the leading conceptions of law. But they applied to the handling of their own concrete rules and problems a mastery of general principles and a love for harmony and consistency which are essentially philosophical. They were pervaded by the sense of historic growth and change, for had they not before them the relations of

[1] There was practically only one set of laws or customs belonging to highly civilized communities which the Romans could compare with their own law, those, namely, which they found in the various Greek cities. These laws and customs, though varying a good deal in detail, from city to city, seem to have borne a family likeness to one another. The laws of the Italic cities were probably on the whole similar to those of Rome herself. But the customs of the Carthaginians, of the Syrians, and of the Egyptians, had many peculiar features.

the old and the new in many institutions—the development of *Formula* beside *Legis Actio*, of *Ius Gentium* beside *Ius Civile*, of *Bonorum possessio* beside *Haereditas*, of *Longi temporis praescriptio* beside *Usucapio*? The one thing in which it may be said that a systematic science of law might have helped them was the arrangement and distribution of topics. For this they certainly cared little and did little. But the taste for systematic arrangement was never strong in the ancient world. Perhaps the modern appreciation of it dates back to the scholastic philosophy of the Middle Ages, which spent much thought on what the logicians called Division. Perhaps it has been reinforced by the more recent progress of Natural History, which furnishes in the classification of the animal and vegetable kingdoms the grandest example of orderly schemes of distribution based on scientific lines.

This excellence of the Romans in the sphere of concrete law confirms the view we were led to take that the contents of a Philosophy or Science of Law in general are not large, being indeed confined to the defining of the relation of Law to Ethics and other cognate branches of philosophy, and to the examination of some fundamental legal conceptions, important no doubt, but not very numerous. The solid and essential value of legal science begins in the manipulation of the material presented by an actual system of law, in the moulding of the old customs so as to reconcile them with the always changing needs of the people. And this has been the doctrine and practice of the greatest foreign masters of the Roman law in modern times. It was the doctrine of Savigny, who opposed his historical method to the

abstractions of the contemporary Hegelians, and it prevailed in the struggle. I remember the way in which it was conveyed to me by one of the greatest of Savigny's school, Dr. Karl Adolf von Vangerow, to whose brilliant and stimulating lectures I listened at Heidelberg, now many years ago. Inspired by my Scottish and Oxford training with the notion that in order to study a subject rightly one must begin with its metaphysics, I asked the professor, on one of the days when his students were permitted to call on him, what book on the Philosophy of Law (*Rechtsphilosophie*) I ought to read. He raised his eyebrows till they seemed to reach the top of his head, and said with a deprecating wave of his hand, 'I doubt whether that kind of reading will help you with your legal studies. I see little use in it. But if you really do want to study such a topic ——well, there is the *Naturrecht* of my colleague Herr Dr. Röder: you can look at it.' Nearly all the jurists to whom the development of modern Roman law in the nineteenth century in Germany has been due have taken a similar view, and have spent their powers either on the same questions as those which occupied the Roman sages or on the application of Roman principles and doctrines to the phenomena and conditions of modern times, and especially of modern commerce. They have been philosophical in their use of the analytic and historical methods, philosophical, that is to say, as compared with Lord Coke or Lord St. Leonards, and they have greatly improved on the division and classification of topics which we find in the Roman books. But they have troubled themselves about the abstract philosophy of law just as little as those two

famous judges, or as those august Romans who divided their time between the composition of legal treatises and advising the Emperor on the ordinances which he issued for the whole civilized world.

Not a few of the great Roman jurists (including Julian, Papinian, and Ulpian) sat in the imperial consistory, and were practically not only judges of the highest Court of Appeal but also legislators. An estimate of their scientific merits must include this branch of their activity, whether as settling the form of decrees to be passed by the Senate, or as drafting enactments to be issued in the name of the Emperor. For legal science is not merely either expository on the one hand, or on the other dispensatory and corrective, securing to each what is his, but is also Constructive and Ameliorative, framing rules under which society may advance steadily and smoothly, may get rid of obsolete doctrines, may find new facts adequately dealt with under new rules. It was a great advantage for the Empire, and one which furnished some compensation for the absence of representative legislatures that the business of law-making lay in the hands of competent legal experts. Legislation presents itself to us as being above all things an expression of the will of the people, who know where the shoe pinches them, and have the general interest, not that of a monarch or a privileged class, in their minds. Yet a wise despot, with pure purposes and a command of the best legal advice, may be expected to legislate in the general interest, and most of the legislation of the emperors during the first three centuries, though it was often misguided in the sphere of financial administration, was conceived in the

interest of the population at large. What was specially due to the lawyers who advised the Emperor was the policy followed in amending the general private law, and in bringing it into a more orderly and consistent condition. In this respect they vindicated their claim to be truly scientific. The work of law reform went on upon broad principles, unhasting and unresting, till the anomalies and injustice of the old system had been almost entirely removed. Yet there was left for a long time in the provinces a local variety of law which corresponded to and respected the local needs and sentiments of the populations. No passion for a rigid uniformity seems to have blinded the advisers of the Emperor to the truth that the first business of law is to subserve the well-being of the people and to win their confidence as well as command their obedience. In this respect also they were not merely 'priests of justice,' as they liked to call themselves, but also worthy servants of science. The Roman Empire maintained itself in the East for more than eleven centuries after the last of the classical jurists. In the West its influence survived its political existence, and its law in particular became the foundation of that which came to prevail over Continental Europe. As it was largely owing to the strength derived from its legal and administrative structure that the Eastern Empire lived so long, so the permanence of the Roman law in the West is some proof of the attachment of the people to it, and so of its intrinsic merits. Both facts are alike a tribute to the scientific character of the system and to the scientific genius of the men who moulded it. For no system could have passed through the changes which the East underwent, or survived the storms which

broke upon the West, save one which by the dominance of clear and broad principles and the symmetrical development of rules from those principles had become at once intelligible, flexible, and consistent.

Let us see what are the conclusions to which we have, by this somewhat devious course, been led.

1. There are four chief methods of studying law—the Metaphysical, the Analytical, the Historical, and the Comparative.

2. Each of these has its proper sphere and its distinctive value, even if the two latter are of most general practical service.

3. All four ought to find a place in a complete scheme of legal training.

4. The two former are applicable only to the rudiments and to some particular parts of the subject, the two latter are profitable all through it, and specially so when they can be combined.

5. The Roman jurists pass so lightly over the theoretical side of law that the first method supplies them with little more than a few general phrases. Although their definitions are the result of analysis, they do not formally or of set purpose employ the second. They use the Historical method freely, though almost unconsciously. At one stage in the growth of their law they applied to some extent the Comparative method, being led to it by the facts they had to deal with. But they seldom mention any law but their own.

6. The Romans, though saying little about the broad aspects or so-called Philosophy of Law, do in fact pursue it in a philosophic spirit; and to this spirit the excellence of their system is largely due.

7. Their example shows us that it is not the effort to discuss law in a metaphysical or abstract way that makes a body of law truly philosophical, but rather the power of so framing general rules as to make them the expression of legal principles, and of working out these rules into their details so as to keep the details in harmony with the principles.

In other words, it is Reasonableness, Simplicity, Self-consistency that make the excellence of a legal system, and the best methods of study are those which attune the lawyer's mind to seek after these qualities, and which enable him to hold a middle course between viewiness and the pursuit of an impossible perfection on the one hand and bondage to the letter on the other.

XIII

THE RELATIONS OF LAW AND RELIGION

THE MOSQUE EL AZHAR

To the modern European world Religion and Law seem rather opposed than akin, the points of contrast more numerous and significant than the points of resemblance. They are deemed to be opposed as that which is free and spontaneous is opposed to that which is rigid and compulsive, as that which belongs to the inner world of personal conscience and feeling is opposed to that which belongs to the outer world of social organization and binding rights. The one springs from and leads to God, who is the beginning and the end of all religious life; the other is enforced by and itself builds up and knits together the State. Even where the law in question is the revealed Law of God the contrast remains. The efforts which we find in the New Testament, and especially in some of St. Paul's Epistles, to reconcile the law delivered to Israel with the dispensation of the New Covenant, all point to and assume an antagonism. Grace, that is to say, the spontaneous goodness and favour of God, is felt as the antithesis to the Law; and it is only when human nature has been brought into complete accord with

God's will that the antithesis vanishes, and we have the Perfect Law of Liberty.

This law of liberty, moreover, is not positive law at all, but supersedes that law; for when all men have been so made perfect, the need for human law has ceased, because their several wills, being in accord with the will of God, must needs be also in accord with one another.

This antagonism of Law and Religion has been conspicuous in the relations to each other of the lines of thought followed by the ministers of religion on the one hand and the students or practitioners of law on the other. In the theology of the Reformers of the sixteenth and two following centuries Legalism is a term of reproach and is contrasted with the freedom of the Gospel. Readers of the *Pilgrim's Progress* will remember the part played in it by old Mr. Legality. The clergy have been apt to dislike lawyers, to accuse them of cramping the freedom of the Church, and of desiring to bind it in State fetters. Erastianism, of which some lawyers and statesmen have been known to be proud, is a name of dark reproach on ecclesiastical lips, while the legal profession on its part, though it has always had to yield precedence to the other gown, conceives that the Church needs to be strictly controlled, gladly seizes occasion for limiting the action of her ministers, often suspects them of trying to evade or pervert the law, and is prone to bring accusations, more or less railing, against them, as seeking to compass their (possibly excellent) ends by irregular or even illegal methods.

But in earlier times, and in many countries, the two

lines of thought, the two branches of learning, the two professions, whether as teaching or as practising professions, were either united or deemed to have a close affinity. In the lowest forms of organized society, such as we find among the aborigines of Canada and South Africa, the first kind of profession that appears is usually that of the wizard or practitioner of magic, and the rudiments of a priest are developed out of the medicine man, who represents the most rudimentary form of the physician. But in this stage of progress there is no religion properly so called, and the usages that prevail and which are the material out of which law will grow, are too few, too rude, and too often interrupted by violence, to form a system of settled and harmonized rules. When, however, Religion and Theology begin to emerge from the superstitions of the savage state, and when custom, already settled, and growing more complex with the progress of culture, has enabled civil society to organize itself in institutions, Law and Theology are usually found in close affinity. Law everywhere begins with Custom. Now many of the Customs which form Law are concerned with worship, because the relations they regulate are relations depending on religion. The Family is a religious as well as a natural organism, for it is often sacred, and in many peoples is held together by the common worship which its members owe to the spirits of their ancestors. Hence the maxims that regulate marriage, and the relation of parents to children, and the devolution of property, have a religious basis, and are precepts of religion no less than rules of law. To take vengeance for the killing of a near relative is a duty

which the pious son or brother owes to the ghost of the slain; while on the other side the slaughter has created a legal right the enforcement of which, by compelling the payment of a proper compensation to be exacted from the slayer or his kinsfolk, will also satisfy the religious obligation. Other relations of men to one another not primarily religious become so by being placed under supernatural protection. Where a promise or agreement is to be rendered specially binding, the party engaging himself takes an oath invoking the Divine Power, and perhaps takes it at a shrine, or (as in Iceland) on a temple-ring, or (as in the Middle Ages) on the relics of a saint. These contracts are not confined to private affairs. Treaties are made in the same solemn way. Compacts such as that for the single combat of Paris and Menelaus in the *Iliad*[1], are placed under the sanction of the gods by a formal appeal to them as witnesses. And when a person who had violated such an oath dies suddenly, his death is ascribed to the anger of the Powers to whose keeping his promise had been committed[2]. In such cases the priest of the deity invoked is apt to become the interpreter of the obligation undertaken, or the arbiter as to how far it has been performed. Possibly he is made the keeper of an object for which safe custody is desired, or the depositary of an object whose ownership is disputed. Sometimes, indeed, it is rather within the breasts of chiefs or kings (since they act as judges and exercise

[1] Il. iii. 276–280. The appeal in this case is to Zeus, to the Sun, to the Rivers and to the Earth.

[2] Thus we are told by an early Irish annalist that 'the sun and the wind killed Laoghaire (king of Ireland in the time of St. Patrick) because he broke his oath to the men of Munster.'

executive power) than in those of priests that the knowledge of customs and maxims is deemed to reside. But in these cases the royal office has itself, if not a priestly, yet a sacred character, and the priest plays no leading part in the political or social system. The nature of the religion, and its more or less mystical tendency, have of course a good deal to do with the place allotted to the priesthood in early societies.

Where legal rules take the form of written records embodying what is held to have been delivered to a people either directly by the deity or through sages recognized as inspired or guided by some divine power, the sanctity of law reaches its maximum. It is then a part of religion, and those who know it and expound it have a religious no less than a legal function.

In such documentary records Law and Religion are often so closely interwoven as to be scarcely separable. Many rules are secular in one aspect, religious in another, so that it may be doubted which kind of motive prompted them, which kind of object they were designed to secure. A regulation of ceremonial purity may have its, perhaps forgotten, origin in considerations of a sanitary nature. A sacrifice prescribed as an atonement for sin may also operate as a civil penalty. Offences against the community may be deemed primarily offences against the deity and so dealt with; and a frequent punishment for what we should now call crimes is to devote the culprit to the wrath of the powers of the nether world, or to deprive him of the protection of those who rule the upper world, and therewith expose him to outlawry, the oldest of all legal sanctions.

In nations living under the influence of such ideas, the exponents of Law and Religion tend to be the same persons, because these two branches of public administration are conceived as being the same, or at least two different sides of the same thing. Such persons may or may not be priests performing sacrifices or consulting the deity through oracles, or omens, or a sacred lot. But they are the depositaries of the sacred traditions, and it is they who interpret those traditions and apply them to concrete cases. As such they are usually among the ablest and most educated persons in the community, sometimes prominent members of the ruling class.

Yet Religion must not in such a state of society be conceived as the dominant power, which gives birth to Law. In early societies the duties and acts which belong to the external or secular side of life are more important than is the part of life concerned with the emotions felt towards the deity, whether of reverence, love, or fear. But in the observance of all the established customs and in the performance of all the prescribed ceremonies, that which is pleasing to the gods is not separated even in thought from that which is salutary for the community. The service of the deity consists, apart from occasions of orgiastic excitement, not in the emotional attitude of the soul, but in the discharge of the duties recognized as owed to the family and the community, duties which are more or less moral according to the character of the religion—for righteousness may hold a higher or a lower place among them—but which, whether they relate on the one hand to sacrifices offered and fasts observed, or on the other hand to the fulfil-

ment of all that the tribe or the State expects from its citizens, are external duties. In most early nations, these duties are prescribed not by religious emotion, but by settled usages and rules which have the sanction alike of the State whose welfare is involved in their observance, and of the unseen Powers that protect it. The people have not yet begun to distinguish by analysis the three elements of Law, Morality and Devotion, though here and there the voices of lofty spirits, such as the prophets of Israel, are heard proclaiming the supremacy of the law of righteousness as the true expression of the Will of God, and obedience to it as the truest service that can be rendered by His creatures.

The relation borne by Law, Morality, and Worship, each to the other, differs widely in different peoples. The student of early society must be always on his guard, like the student of natural history, against expecting a greater uniformity than in fact exists, and against generalizing broadly from a few striking instances. Even so brilliant a speculator as Sir Henry Maine fell into the error of assuming the system of paternal power to be practically universal in certain stages of society. Among our Scandinavian and Low German ancestors, for example, it would appear (so far as our imperfect data go) that the worship of the gods had not very much to do with legal usages and civil polity, though to be sure other influences came in at a comparatively early stage to turn the current of their development[1]. The same may be true of the Gadhelic

[1] But in Norway the Assembly is usually held at a temple, as in Iceland the Goði is both a priest and a chief, and the temple is the place where judicial oaths are taken. See Essay V, vol. i. p. 318.

tribes, though the knowledge we have regarding their usages and worship while still heathen is lamentably scanty. There is, however, in the records of early Rome and of the Greeks, as well as in those of some Eastern nations, a good deal to illustrate the view I have been trying to state.

A striking example of conditions of thought and practice in which religion had (at a comparatively advanced stage) been so involved in law as to be almost stifled by law is furnished by the Jewish people as we find them under Roman dominion. The lawyers referred to in the New Testament[1] (a class of whom there are but few traces before the Captivity) are not priests (though of course a priest might happen to be learned in the law), yet they have a quasi-sacerdotal position as conversant with and able to interpret a body of rules which are of divine origin, and embrace the relations of man to God as well as to his fellow men. Between religious duty and religious ceremony on the one hand and the performance of civil duties on the other there is no line of demarcation: all are of like obligation and are tried by similar canons. Hence piety tends to degenerate into formalism: hence the precisians who insist upon petty externalities and neglect the weightier duties deserve and incur the rebukes of a higher spiritual teaching. It may indeed be said that one great part of the work recorded in the Gospels, regarded on its historical side, was to disjoin Law from Religion or

[1] The *γραμματεῖς* (scribes), *νομικοί* (lawyers), and *νομοδιδάσκαλοι* (doctors of the law) of the New Testament seem to be different names for the same class, and identical with the *ἱερογραμματεῖς* of Josephus.

Religion from Law. And this work was performed not merely by superseding parts of the law known as that of Moses, or by giving a new sense to that law, but also by transforming Religion itself, purging away the externals of sacrifice and other ceremonial rights, and leading the renewed and purified soul into 'the glorious liberty of the people of God.'

That majority of the Jewish race which did not accept the teachings of Christ continued for many centuries, scattered and depressed as it was after the destruction of Jerusalem, to treat its ancient law-books and the traditions which had gathered round them as being both a body of civil rules and a religious guide of life. Despite the tendency to formalism which has been noted, there were among the Rabbis of the early centuries A.D. not a few who dwelt upon the moral and emotional side of the Mosaic Law, and who through it sustained the spirit of the sorely tried nation.

In the Christian Church also ceremonies and external observances came before long to play a great part in worship, and were for ages an essential element in the popular conception, indeed in the practically universal conception, of Christianity itself both as a theology and as a religion. The atmosphere which surrounded nascent Christianity was an atmosphere saturated with rites and observances. There were in the primitive Church some few usages and in the New Testament some few texts on which it was possible to erect a fabric of ceremonial worship. But even if these conditions had been absent, the tendencies of human nature to create a body of ritual and to attach a sort

of legal sanction to the external duties which custom prescribed would have prevailed.

How far the rites and practices which nearly every branch of the Christian Church has to a greater or less extent enjoined are each of them interwoven with the vital tenets of the faith, is a question not likely to be settled in any future that we can foresee. But the conception of the 'Kingdom of the Heavens' as something dissevered from the obligations imposed by legal tradition has also remained ever since in Christianity as a principle of profound significance, which has at different times emerged in various forms to become sometimes a destroying, sometimes a vivifying and transforming force. Such sayings as 'Where the Spirit of the Lord is, there is liberty,' or 'He hath made you kings and priests to God,' or 'Ye are not under the Law but under Grace,' have from time to time roused men to hold themselves delivered from all bonds of custom expounded or rules enforced by ecclesiastical authority.

I will not, however, attempt to follow out the intricate relations between the two conceptions, as they appear in the long course either of Christian or of Jewish annals, but will pass on to consider the phenomena of their connexion in another field, one in which the phenomena are comparatively simple, and lie open to-day to the study of every traveller in a land where the old and the new stand in striking contrast.

The best modern instance of the identity of Religion and Law is to be found in that originally misconceived and subsequently perverted form of Judaism which still prevails extensively over the eastern world, and recognizes Muhamad of Mecca as the last and greatest

of the prophets of Jehovah. In Islam, Law is Religion and Religion is Law, because both have the same source and an equal authority, being both contained in the same divine revelation. I cannot better illustrate their union than by giving a short account of an ancient and splendid University where they are taught as one, hoping that so much of digression as is thereby involved will be pardoned in respect of the interest which this famous seat of learning deserves to excite, and of the light which it casts on the early history of the Universities of Europe—of Bologna and Paris, of Padua and Salamanca and Prague, and of our own Oxford and Cambridge.

About three hundred and fifty years after Muhamad, and towards the end of the tenth century of the Christian era, Johar, general of the Fatimite Sultans established at Tunis, conquered Egypt. When he built Cairo (El Kahira, 'the Victorious'), not far from the decayed Memphis, he founded in the new city a mosque which presently obtained the name of El Azhar, that is to say, 'The Flowers' or 'The Flourishing.' The Fatimites, belonging to the schismatic sect of the Shiites, were particularly anxious to establish their ecclesiastical position against the orthodox Sunnites, and, just as Protestant princes in the sixteenth century founded universities for the defence of their tenets—as, for instance, Elector John of Saxony set up the University of Jena—so the second Fatimite ruler of Egypt, Khalif Aziz Billah, resolved to attract learned men to his capital. He gathered famous teachers to the Mosque, and there was soon a great afflux of students. Sultan Hākim (probably a mad-

man), who went so far beyond the doctrines of Shiism as to declare himself an incarnation of Ali and a Mahdi, closed El Azhar, and transferred the University to another mosque which he had founded. However, the teaching staff was subsequently brought back to El Azhar (which returned finally to Sunnite orthodoxy with the conquest of Egypt by Saladin in 1171 A.D.), and it has been now for many centuries the greatest University in the Musulman world, being situate in what has been, since the decline of Bagdad, the greatest purely Musulman city[1]. The number of students sometimes reaches ten thousand; at the time of my visit (in 1888) it was estimated at eight thousand.

The whole teaching of the University is carried on within the walls of the Mosque, a large group of buildings, approached by six gates, and standing in the oldest part of Cairo. The chief entrance is from the Alley (or arcade) of the Booksellers in the Bazaar. At the outer portal, in the portico, the visitor leaves his shoes. To the left of the inner portal I found a noble square hall, said to date from the fourteenth century, as lofty as the chapel of Magdalen College and about as large, though different in shape, with beautiful marbles on the walls, and an aisle separated from the rest of the chamber by a row of tall columns, supporting slightly pointed arches. The sunlight came in through large openings,

[1] Stambul (Constantinople) is larger, but Stambul has always had a large Christian element, whereas Cairo was till about thirty years ago almost wholly Muhamadan. Moreover Cairo was better situated for drawing students from North Africa and Western Asia than Stambul, which is almost on the outermost edge of the Musulman world.

filled by no glass, under the roof. In the centre there were sitting or kneeling or crouching some eighty or ninety men in an irregular circle, mostly young men, yet many over thirty and some as old as fifty, with their shoes laid beside them on the matting. In front of them, sitting cross-legged on a low wooden throne, was an elderly professor, holding a book in his hands, and appearing to read from it. Now and then a question came to him from the circle, which he answered quickly; but otherwise the audience were perfectly still, and no sound was heard save his own low voice and the beating of the wings of the birds as they flew to and fro above. The book was an authoritative commentary on the Sacred Law, to which he added his own explanations as he read; and he was treating of the four requisites of prayer, especially of the first of the four, viz. Devotional Intent. No one took notes, but all listened with the closest attention. He was the Chief Sheik of the Mosque, and in virtue of his office, also the Sheik-ul-Islam or chief ecclesiastical and legal authority of Egypt, which, being expressed in the terms of an English University, would make him Chancellor, Regius Professor of Divinity and Regius Professor of Civil Law rolled into one, and therewithal also Archbishop of Canterbury and Lord High Chancellor.

In the similar but rather less spacious and ornate room opposite I found another class, smaller, and composed of somewhat younger men, listening to a lecture on what the Muslims call Dealings, *i. e.* civil law. The subject was Wills, and the requisites to the validity of a will, such as the sanity, freedom and full

age of the testator, were being explained with reference to a book of authority which lay before the lecturer, a younger man than the Chief Sheik. He spoke with a fluency, clearness and evident power of interesting the class, which reminded me of a brilliant teacher whom I had heard twenty-five years before discoursing on the same subject at Heidelberg.

Led hence under the lofty gateway which gives access to the great court, I saw, like an earlier traveller, characters inscribed above the gate, and was told by my Virgil that their import was—'Actions must be judged by their intent, and every man shall be requited according to what he purposed'—a maxim which belongs in one sense to religion, in another to law, but requires, like the corresponding phrase of our civilians—*Actus non est reus nisi mens sit rea*—to be carefully defined and qualified before it can be applied, seeing how often good intent is followed by bad result.

The great Court of the Mosque is a quadrangle nearly as large as that of Christ Church, Oxford, and was once, like that of Christ Church, surrounded by arcades resting on columns, of which now only a few remain. There are three tanks for ablutions and a great cistern of Nile water beneath, whence vessels are filled by boys who carry it round among the groups. It is the hour of forenoon rest between the morning lecture and the noontide meal, and a confused din of many voices rises from the six or seven hundred persons scattered through the quadrangle, whose ample space they do not crowd. The men, mostly young, are sitting or lying all over the flagged surface, reading or talking or reciting with a book open before them, many swaying backwards and

forwards as they chant, all in the blaze of sunlight. Piles of thin, tough cakes, of which more anon, stand here and there. Through the groups walks a sturdy official bearing aloft a formidable symbol of order, two long and heavy flat strips of leather attached to a stout handle, wherewith he coerces any disturber of the peace of the Mosque. Discipline is easily maintained, for the Oriental, unless violently excited, is submissive to authority, and dangerous only in a mob. Moreover the students are mostly poor, and therefore attentive to their studies. The arcade on the south-east side is filled with knots of boys from eight to fourteen years of age sitting round their teachers, each with a metal slate, a brass ink-horn, and a reed pen; some gathered round a teacher armed with a long palm stick. They read aloud from the slate what they have written, thus learning by heart verses of the Koran, copies of which are set up on wicker stands, because the sacred volume must never be lower than the reader's waist.

Adjoining the great quadrangle is the Liwan, or hall for prayer and preaching. It is really two parallel halls, partially separated by a wall, and divided into nine aisles by rows of columns nearly four hundred in number, the shafts of granite or marble with carved capitals. They were doubtless brought hither from Christian churches long since destroyed[1], churches that may have echoed to the voices of Athanasius and of Cyril. Along the side towards Mecca are four short recesses (Kiblas) resembling the apses of an early Christian

[1] The columns of the ancient and most sacred mosque at Kairoan or Kêrwan (in the territory of Tunis), built by Sidi Okba, the conqueror of North Africa, were brought from Christian churches, and many from the great basilica of Carthage, the floor of which has been recently uncovered.

basilica, though much smaller, one for each of the four legal orthodox sects of Muslims. Beside the chief Kibla there is placed, high up on the wall, a small wooden box containing relics, among which is one equally fit to be revered by Jews, Christians and Muslims, viz. a piece of Noah's Ark. The effect of the hall is due rather to its vastness and to the maze of pillars than to any beauty in form or decorations; for the walls are plain, and the low roof makes the interior more sombre than either the famous mosque of Kêrwan or the still more rich and majestic mosque of the Ommiyad Khalifs at Cordova. As I entered this Liwan, the hour of midday prayers had arrived, and the crowd of students rose suddenly and, turning towards the four Kiblas, performed their devotions. This done, the multitude, passing noiselessly, for every foot is unshod, through the maze of columns, sorted itself into classes, each grouped in an incomplete circle round its own professor. Every regular professor has his column, at whose foot he sits, leaning against it; and here he reads or talks loudly enough to be heard over the din by those near him, for the clamour of many voices is lessened by the amplitude of the chamber. The younger or less privileged lecturers mostly gather their hearers outside in the Court, though I found a class of youths learning the elements of grammar at the foot of one of the Liwan columns. The lectures were mostly on grammar, which has a religious side, because it includes prosody and the proper pronunciation of the Koran. One eminent professor, who was also Select Preacher for the time being, was discoursing on Ibn Malek's treatise on Arabic Grammar, holding in his

hand the treatise, which is a poem of one thousand verses. All the class had copies, and continued to listen with untroubled gravity while a cat walked across between them and the professor. Another teacher, lecturing on logic, was being interrupted by a running fire of questions from his pupils, which he answered with swift promptitude and terseness.

There are about two hundred and thirty professors, that is to say, persons authorized to teach and engaged in teaching[1]. As in the universities of mediaeval Europe, graduation consists in a certificate of competence to teach; and this is given to those who have spent the prescribed time in study by inscribing in the copy of the book which the graduate has been studying a statement by the teacher that he has mastered the contents of that book. When a certificate of wider attainments is sought, the candidate is examined orally by two or three sheiks. As in the Middle Ages, there are no written examinations; and indeed writing is but little used, the aim of teaching being rather to cultivate the memory. The books studied are always the same, so there is no occasion for examination statutes and Notices of Boards of Studies. The freshman begins with what is called Balagha, the use of language, a subject which comprises grammar, logic (with the elements of metaphysics), and rhetoric. Next follows theology, the Nature of God and the functions of the Prophet, after which comes the Law, including both the precepts of religion as applied in practice and those of what we should call civil or

[1] In the session of 1898–9 there were 198 professors and 7,676 students attached to the Mosque itself (without counting its dependent Kuttabs).

secular law, both of them based on the Koran and the Hadith or sacred tradition. Instruction is no longer given in medicine here. When taught, it was taught, as it is still in the University of Fez, from an Arabic translation of Aristotle. The course prescribed for one who aspires to be a Kadi (Judge of the Sheriat or Sacred Law) is fourteen years, but an even longer time would be needed to fit a man to be a Mufti or doctor of the law. Five or six years, I was told, would qualify a student to become a village schoolmaster, able to teach the elements of religion and to advise the peasants on questions of divorce, just as in rural England the schoolmaster used to draw wills, with much ultimate benefit to the legal profession: and the same length of study might enable a man to become Imam (curate in charge) of a small mosque. Study consists, in every branch, chiefly in learning by heart. Even religion is taught through rules for prayer and almsgiving, which must be exactly remembered. But there is also a large field for the development of subtlety of mind in the casuistical distinctions which form a large part of law, both moral and civil. Neither physical science, nor history, nor any language save Arabic is recognized, nor (which is more surprising) do arithmetic and mathematics now find a place[1].

The students come from all parts of the Musulman world, but the large majority from Egypt: and the Muslim legal sect to which most Egyptians belong (the Shafite)

[1] In 1896 (eight years after my visit) instruction began to be provided in geometry, algebra, arithmetic and geography, but it is given by secular teachers appointed by the Egyptian Government, not by the regular staff of the Mosque.

is accordingly the most numerous[1], amounting to nearly half the total. They are mostly poor, and live to some extent on the charitable gifts of the citizens, paying nothing for their instruction. But a certain number share in a kind of endowment which deserves notice, because it is the germ of a College—a germ, however, which never grew into a plant.

The word *Riwak* (accent on the last syllable), properly a colonnade or corridor, is used at El Azhar to denote an apartment or set of apartments, allotted to certain students as sleeping-quarters. There are in the Mosque buildings many Riwaks, and several are set apart for students coming from some particular countries[2]. There is one for the Syrians, one for the natives of Mogreb (North-West Africa, from Tripoli to Morocco), one for the Kurds, one for the natives of Mecca and Medina (El Haramein), one for the Sudanese of Sennaar, and so forth. Some are well ventilated and comfortable, such as that endowed by Ratib Pasha for Hanefites: some plain and bare. It is of course only in the three or four colder months that a roof is needed; during the summer night quarters *à la belle étoile* are preferable. Practically, I was told, every student who wished could obtain quarters in a Riwak, because only

[1] In 1898–9 the numbers of the four sects were as follows:
Shafites—Professors, 86; Students, 3,495.
Hanefites—Professors, 41; Students, 2,168.
Malekites—Professors, 68; Students, 1,983.
Hanbalites—Professors, 3; Students, 30.

[2] Place of birth constituted an important basis of classification in mediaeval Universities. In Oxford, as in Paris, the students were divided into the Northern and Southern nations (whence the two Proctors), and in each of the Universities of Glasgow and Aberdeen there are still four Nations, a system of organization preserved for the purposes of the election of a Lord Rector. Nations exist also in the University of Upsala.

the poor desire to be so accommodated: and a sleeping-place means no more than a bit of floor on which to spread your prayer carpet and place your chest of books and clothes. But the Riwaks (or most of them) also supply rations of bread to those students who apply for them when they have reached a certain stage of proficiency, that is, have mastered two or three books and obtained a certificate to that effect. These rations consist of wheaten cakes, thin and tough, and are supplied out of endowments which have from time to time been bestowed on the Mosque or on particular Riwaks by pious founders. These wheaten cakes are in fact the very rudest form of what is called in Scotland a Bursary, and in England an Exhibition or Scholarship; and the assignment of a Riwak as lodgings to students from a particular district may be compared with the earliest provision of a dwelling and a pittance for students in England, the acorn out of which there has grown the superb system of the Colleges of Oxford and Cambridge, many of them originally connected with particular counties.

The Mosque, that is to say the University, as distinguished from the particular Riwaks, had at one time considerable endowments, called in Arabic Wakfs (pronounced Wakufs); but a large part of these endowments were seized by Muhamad Ali early in the nineteenth century (about 1820). In respect of them a considerable sum is now paid from the public treasury, and a further income is derived from the Wakfs which not having been seized, are now administered by the Government department in charge of charitable foundations. The present income of such foundations as remain is trifling, and

the slender incomes of the senior professors are supplemented by small payments from Government and by gifts from pious persons. The richer students are also expected to offer gifts, and sometimes a charitable citizen will send a sheep to give the poor students a better dinner on a feast-day[1].

Before leaving the University I was presented to its head, the Sheik El Azhar, whom I found sitting to hear and determine divers matters, his lectures having been disposed of in the forenoon. He was too great a man to rise to receive me, nor is it easy to rise when one sits cross-legged; but he placed his hand upon his heart with a dignified courtesy and invited me to seat myself beside him. His disciples were kneeling round him. He was more like an old Lord Chancellor than an old archbishop, with an air rather of complacent judicial shrewdness than of apostolic unction. When it had been explained to him that I was a lawyer and that law was taught in the Universities of England, he remarked that religion consists in conduct and behaviour, whereto I replied that the Roman jurists stated another side of the same truth when they said, 'Iuris praecepta haec sunt, *honeste vivere, alterum non laedere, suum cuique tribuere.*'

It was impossible to spend a day in El Azhar without being struck by its similarity to the Universities of

[1] In 1898–9 the total sum paid to El Azhar out of the public treasury was LE (Egyptian pounds) 6,611, and out of the administration of the Wakfs LE5,224, besides a sum of LE1,512 derived from the endowments of the several Riwaks. The best endowed Riwaks are those of the Turks (516) and of the Mogrebins (364). I owe these figures to the kindness of my friend Yacoub Artin Pasha, the energetic and enlightened head of the educational administration of Egypt. The Egyptian pound is about twenty shillings and fourpence.

Europe as they existed in the thirteenth and fourteenth centuries.

In both an extreme simplicity of appliances. Nothing more than a few buildings capable of giving shelter has been needed here or was needed there: for a University is after all only a mass of persons possessing or desiring learning, a concourse of men, some willing to teach and others eager to be taught.

In both a like simplicity of educational arrangements. Every graduate is, or may be if he likes, a teacher, and graduation is nothing more than a certificate of knowledge qualifying a man to teach.

In both, comparatively slender funds, which however increase slowly by the gifts of private benefactors. The whole establishment of El Azhar costs about £14,000 sterling a year, rather more than half of which goes in salaries to the professors, while about £1,600 goes in prizes and charitable aid to the students. Eight thousand (roughly speaking) are taught there at a cost of £1 15*s*. per student. The University of Oxford and its colleges (taken together) with about three thousand undergraduate students have an annual revenue of about £333,000[1]; Harvard University in Massachusetts with nearly four thousand students has £235,000 (of which tuition fees contribute £114,000).

In both, the greatest freedom for the student. He may study as much or as little as he pleases, may select what professor he pleases, may live where he

[1] Of this sum (which has been arrived at after deducting outgoings on estates, so that as respects this kind of property it represents net revenue) £55,000 is the revenue of the University and £278,000 the revenue of all the Colleges, including fees and room rents.

pleases, may stay as long as he pleases, and may be examined or not as he pleases.

In both, a narrow circle of subjects and practically no choice of curriculum. El Azhar teaches even fewer branches than did Oxford or Bologna in the thirteenth century, for in Musulman countries the Koran has swallowed up other topics more than theology, queen of the sciences, and the study of the Civil and Canon Laws did in Europe. But a vast range of matters which are to-day taught in German, in American, and even in English Universities lie outside both the Trivium and Quadrivium and the professional faculties as they stood in the Middle Ages.

In both, little separation between teachers and pupils, and a mixture of students of all ages, from boys of twelve to men of fifty. In Oxford there is a tradition that marbles used to be played by students on the steps of the Schools. Why not, when one sees boys of twelve learning to read the Koran at El Azhar? Oxford may well have been then, like this mosque now, a school for persons of all ages.

In both, a body of men liable to turbulence, and easily roused by political passion. A multitude living together without family ties or regular industrial occupation is prone to fanaticism; and the students of El Azhar, like the Softas at Constantinople, like the monks of Alexandria in the days of Cyril and Hypatia, have sometimes raised tumults; though these would be repressed more savagely here, should they displease the ruling powers, than were those for which Paris and Oxford were famous in days when their scholars were fired by religious or political excitement, and when the

movements of public opinion and the tendencies we now call democratic found through the eager crowd of university youth their most free and prompt expression.

Finally, in both, a kind of teaching and study which tends to the development of two aptitudes to the neglect of all others, viz. memory and dialectic ingenuity. The first business of the student is to know his text-book, if necessary to know every word of it, together with the different interpretations every obscure text may bear. His next is to be prepared to sustain by quick keen argument and subtle distinction either side of any controverted question which may be proposed for discussion. As the habit of knowing text-books thoroughly—and the knowledge of Aristotle and the Corpus Juris possessed by mediaeval logicians and lawyers was wonderfully exact and minute—made men deferential to authority and tradition, so the constant practice in oral dialectical discussion made men quick, keen, fertile, and adroit in argument. The combination of brilliant acuteness in handling points not yet settled, with unquestioning acceptance of principles and maxims determined by authority, is characteristic of Muhamadan Universities even more than it was of European ones in the Middle Ages, and tended in both to turn men away from the examination of premises and to cast the blight of barrenness upon the extraordinary inventiveness and acuteness which the habit of casuistical discussion develops. And the parallel would probably have been closer could it have been drawn between the Musulman Schools, not as they are now, but as they were during the great age in Bagdad in Spain and in Egypt, and the schools of Western Europe in

the days of Abelard or Duns Scotus. For El Azhar to-day impresses one as a University where both thought and teaching are in a state of decline, where men gnaw the dry bones of dogmas and rules which have come down from a more creative time.

To what causes shall we ascribe the striking contrast between the later history of schools which at one time presented so many similar features? Why has Musulman learning stood still in the stage it reached many centuries ago, while Christian learning, developing and transforming itself, has continually advanced? Why has El Azhar actually gone back? Why does it accomplish nothing to-day for the deepening, or widening, or elevating of Musulman thought?

Of racial differences I say nothing, because to discuss these would carry us too far away from our main subject. Their importance is apt to be overrated, and they are often called in to save the trouble of a more careful analysis, being indeed themselves largely due to historical causes, though causes too far back in the past to be capable of full investigation. Here it is the less necessary to discuss them, because many races have gone to make up the Musulman world, and some of these had attained great intellectual distinction before Islam appeared. Nor will I dwell on the tremendous catastrophe which overwhelmed the Musulman peoples of Western Asia in the twelfth, thirteenth, and fourteenth centuries, when many flourishing seats of arts and letters were overwhelmed by a flood of barbarian invaders, first the Seljukian Turks, then the Mongols of Zinghis Khan, then the Ottoman Turks whose rule has lain like a blight upon Asia Minor,

Syria, and Irak for the last fourteen generations of men. Before the Seljuks and the Mongols came, philosophy and learning, science and art, had in some favoured spots reached a development surpassing that of contemporary Christian states, a development which in the schools of Irak and of Persia had wandered far from orthodox Musulman traditions, but which certainly showed that Islam is not incompatible with intellectual development. That culture, however, which had adorned the days of the earlier Khalifs, decayed even in Spain and in Barbary, where it was not destroyed by a savage enemy. It was not strong enough to recover itself in Syria, Asia Minor, or Egypt, and could neither elevate and refine the Turk nor send up fresh shoots from the root of the tree he had cut down. Even in Persia, though Persia remained a national kingdom, preserving its highly cultivated language and its love of poetry, creative power withered away. While therefore giving full credit to the Arabs, Syrians, and Persians of the earlier Musulman centuries for their achievements, we are still confronted by the fact that the soil which produced that one harvest has never been able to produce another. Scarcely any Musulman writer has for five hundred years made any contribution to the intellectual wealth of the world. Even the Musulman art we admire at Agra and Delhi, at Bijapur and Ahmedabad, was largely the work of European craftsmen. The majestic mosques of Constantinople are imitations of Byzantine buildings. Thus we are forced back upon the question why the Universities of Islam, with all that they represent, have languished and become infertile.

Among the causes to be assigned we may place first of all the greater intellectual freedom which Christianity, even in its darkest days, permitted. The Koran, being taken as an unchangeable and unerring rule of life and thought in all departments, has enslaved men's minds. Even the divergence of different lines of tradition and the varieties of interpretation of its text or of the Traditions, has given no such opening for a stimulative diversity of comment and speculation as the Christian standards, both the Scriptures themselves, the product of different ages and minds, and the writings of the Fathers, secured for Christian theology.

In the second place, the philosophy, theology, and law of Islam have been less affected by external influences than were those of Christian Europe. Greek literature, though a few treatises were translated and studied by some great thinkers, told with no such power upon the general movement of Musulman thought as it did in Europe, and notably in the fifteenth and sixteenth centuries; and Greek influence among Muslims, instead of growing, seems to have passed away.

Thirdly, there has been in the Musulman world an absence of the fertilizing contact and invigorating conflict of different nationalities with their diverse gifts and tendencies. Islam is a tremendous denationalizing force, and has done much to reduce the Eastern world to a monotonous uniformity. The Turks seem to be a race intellectually sterile, and like the peoples of North Africa in earlier days, they did not, when they accepted the religion of Arabia, give to its

culture any such new form or breathe into it any such new spirit as did the Teutonic races when they embraced the religion and assimilated the literature of the Roman world. Only the Persians developed in Sufism a really distinct and interesting type of thought and produced a poetry with a character of its own; and the Persians, being Shiites, have been cut off from the main stream of Musulman development, and have themselves for some centuries past presented the symptoms of a decaying race.

Lastly, the identification of Theology and Law has had a baleful influence on the development of both branches of study. Law has become petrified and casuistical. Religion has become definite, positive, frigid, ceremonial. Theology, in swallowing up law, has itself absorbed the qualities of law. Each has infected the other. In El Azhar theology is taught as if it were law, a narrow sort of law, all authority and no principle. Law is taught as if it was theology, an infallible, unerring, and therefore unprogressive theology. Religious precepts are delivered in El Azhar as matters of external behaviour and ceremony. Some of the duties enjoined, such as prayer, are wholesome in themselves; some, such as almsgiving, are laudable in intention, but beneficial in result only when carried out with intelligence and discrimination; some, such as pilgrimage to Mecca, are purely arbitrary. All, however, are dealt with from the outside: all become mechanical, and the precise regulations for performing them quench the spirit which ought to vivify them. The intellect being thus cramped and the soul thus drilled, theology is dwarfed, and its proper development

arrested. It is not suffered to create, or to help in the creation of, philosophy: and accordingly in El Azhar, philosophy, in that largest sense in which it is the mother of the sciences, because embodying the method and spirit whence each draws its nutriment, finds no place at all.

We are thus brought back to that general question of the relations of religion and law in the Musulman world from which, in the interest naturally roused by the sight of a University recalling the earlier history of Oxford and Cambridge, I have been led to turn aside.

The identification of religion and law rests upon two principles. One is the recognition by Islam of the Koran as a law divinely revealed, covering the whole sphere of man's thought and action. Being divine it is unerring and unchangeable.

The other is the promulgation of this revelation through a monarch both temporal and spiritual, Muhamad, the Prophet of God.

Since the revealed law is unerring, it cannot be questioned, or improved, or in any wise varied. Hence it becomes to those who live under it what a coat of mail would be to a growing youth. It checks all freedom of development and ultimately arrests growth, the growth both of law and of religion.

Since the revelation comes through a prophet who is also a ruler of men, a king and judge, as well as an inspired guide to salvation, it is conveyed in the form of commands. It is a body of positive rules, covering the whole of the Muslim's conduct towards God and towards his fellow men.

Three results follow of necessity.

Religion tends to become a body of stereotyped observances, of duties which are prescribed in their details, and which may be discharged in an almost mechanical way. The Faith is to be held, but held as a set of propositions, which need not be accompanied by any emotion except the sense of absolute submission to the Almighty. Faith, therefore, has not the same sense as it has in the New Testament. It is by works, not by faith (save in so far as faith means the acceptance of the truths of God's existence and of the prophetic mission of Muhamad) that a Muslim is saved. There is little room for the opposition of the letter and the spirit, of the law and grace, for religion has been legalized and literalized. Nevertheless there is in many Muslims a vein of earnest piety, and a piety which really affects conduct. Those Westerns who have praised Islam have often admired it for the wrong things. They admire the fierce militant spirit, and the haughty sense of superiority it fosters. They undervalue the stringency with which it enforces certain moral duties, and the genuine, if somewhat narrow piety which it forms in the better characters.

Law becomes a set of dry definite rules instead of a living organism. It is a mass of enactments dictated by God or His mouthpiece, instead of a group of principles, each of which possesses the power of growth and variation. The two motive powers, whether one calls them springs of progress or standards of excellence, which guided the development and made the greatness of Roman Law, the idea of the Law of Nature and the idea of Utility, as an index to the law of nature, are absent. There is no room for

them where the divine revelation has once for all been delivered. Reason gets no fair chance, because Authority towers over her. Forbidden to examine the immutable rules, she is reduced to weave a web of casuistry round their application. It is only through the interpretation of the sacred text and of the traditions that the Law can be amended or adapted to the needs of a changing world: and one reason why the Musulman world changes so little is to be found in the unchangeability of its Sacred Law. The difficulties which European Powers have found in their efforts—efforts which to be sure have been neither zealous nor persistent—to obtain reforms in the Ottoman Empire, are largely due to the fact that the Sacred Law has a higher claim on Muslim obedience than any civil enactment proceeding from the secular monarch.

Such a system will obviously give little scope for the development of a legal profession. Advocacy is unknown in Musulman countries. The parties conduct their respective cases before the Kadi[1]. They may produce to him opinions signed by doctors of the law in favour of their respective contentions, but the only notion the Musulman (*i. e.* the non-Occidentalized Musulman) can form of an advocate in our sense of the word is a paid, and presumably false, witness.

The community suffers politically. The duty of unquestioning obedience, and the habit of blind submission to authority, dominate and pervade the Musulman mind so completely that its only idea of govern-

[1] Whether this system tends to facilitate the bribing of judges, almost universal in countries ruled by a Musulman monarch, *quaere*.

ment is despotism. Nothing approaching to a free ruling assembly, either primary or representative, has sprung up in a Musulman country; and it would need almost an intellectual revolution to make such a system acceptable or workable there[1].

Finally, it is a consequence of the system described that there is an absolute identity of State and Church. The Church is the State, but it is a highly secular State, wanting many of the attributes we associate with the Church. It commands as a matter of course the physical force of the State, and needs no special anathemas of its own. Its priests, so far as it can be said to have priests, are lawyers, and its lawyers are priests, and its students graduate from the University into what is one and the same profession. As the Church is pre-eminently a militant Church, born and nursed in war, its head, the Khalif, is also of right supreme temporal sovereign. The Pope is Emperor, and the Emperor is Pope. They are not two offices which one man may fill, as the Emperor Maximilian wished to be chosen Pope. They are one office. And accordingly when any spiritual pretender arises, claiming to be a prophet of God, he becomes forthwith, *ex necessitate terminorum*, a temporal ruler, like the Mahdi of the Sudan at the present moment (1888). The only exception to this absolute identification of Church and State (which is of course a fact making most powerfully

[1] I do not mean to suggest that races like those of Arabia, Syria, and Persia, may not under the contact and stimulus of European literature and thought again develop an intellectual life of their own. But it can hardly be a life on the orthodox lines of Islam. The first thing to be hoped for is that Syria and Asia Minor may get rid of the Turk, who has never shown himself fit for anything but fighting.

for despotism) is to be found in the incompetency of the Khalif to pronounce upon the interpretation of the sacred law. This attribute of the Pope is lacking. The spiritual head of the Musulman world, for this purpose, and therewith also its legal head, is a lawyer, the Sheik-ul-Islam, to whom it belongs to deliver authoritative interpretations of questions arising on the law, *i.e.* on the Koran and the Traditions. Such an opinion is called a Fetwa. Against it even a Khalif cannot act without forfeiting his right to the obedience of his subjects, so when any Sovereign claiming to be Khalif wishes to do something of questionable legality, he takes care to procure beforehand from the Sheik-ul-Islam a fetwa covering the case. Being in the Khalif's power, the Sheik rarely hesitates, yet he is in a measure amenable to the opinion of his own profession, and might be reluctant to venture too far. So too the Khalif, though he might depose a recalcitrant Sheik (were such a one ever to be found), and replace him by a more pliant instrument, must also have regard to public sentiment, a power always formidable in the sphere of religion, and the more formidable the more the mind of a people is removed from the influence of habits properly political, and is left to be coloured by religious feeling.

Islam owes these features of its religion, its law and its politics to its source in a divine revelation complete, final, and peremptory. But it is not the only religion that has a like source. The Musulmans class three religious communities as Peoples of the Book. The other two are the Jews and the Christians. Of the Jews I have spoken already. Their system, as it stood

at the time of our Lord's appearing, resembled in many points that which Islam subsequently created, though there was never in it any complete identification of the spiritual and the secular power, because it had a regular hereditary priesthood, which, though for a time acting as leader and ruler, had no permanent coercive secular authority. The Jewish system had, moreover, in the words of the Prophets and in the Psalms influences complementary to the Mosaic law and the Traditions, and corrective of any evils which might spring from undue respect for the latter. Moreover, the historical development of that system was checked by external conquering forces, which ultimately deprived it of the chance of becoming a temporal power.

What, however, shall we say of Christianity? Why has the course of its history been so unlike that of Islam? Why has its origin in a divine revelation not impressed upon it features like those we have been considering? I must be content to indicate, without stopping to describe, a few, and only a few, of the more salient causes.

The Christian revelation as contained in the Old and New Testaments is not, except as regards sections of the Mosaic law, a series of commands. It is partly a record of events, partly a body of poems, partly a series of addresses, discourses, and reflections, speculative, hortatory, or minatory, and mostly cast in a poetic form, and partly a collection of precepts. These precepts are all, or nearly all, primarily moral precepts, which are addressed to the heart and conscience, and they proceed from teachers who had no compulsive power, so that such authority as the precepts possess

is due only to their intrinsic worth, or to the belief that they express the Divine will. Especially in the case of the New Testament (though the same thing is essentially true of the Prophets) the precepts are directed not so much to the enjoining of specific right acts fit to be done as to the creation of a spirit and temper out of which right acts will naturally flow. Had the Pentateuchal law been taken over bodily into Christianity, things might have been different, though the other elements of the revelation would have kept its influence in check. But fortunately among the forces that were at work in the primitive Church, there were some strongly anti-Judaic, so any evil that might have been feared from that quarter was averted.

It is impossible to make a code out of the New Testament. The largest collection of positive precepts, delivered with the most commanding authority, is that contained in the fifth, sixth, and seventh chapters of St. Matthew's Gospel. But these are so far from being laws in the ordinary sense of the word that no body of Christians has ever yet come near to obeying them. Indeed hardly any body of Christians has ever seriously tried to do so. They are obviously addressed to the heart and intended not so much to prescribe acts as to implant principles of action.

Similarly the Epistles are either moral exhortations and expositions of duty or else metaphysical discussions. Neither out of them can any code be framed which a lawgiver could attempt to enforce. Even on the external observances of religion and constitution of the Church, so little is said, and said in such general terms, that Christians have been occupied during the last

four centuries in debating what it was that the authors of the Epistles meant to enjoin.

After the canonical Scriptures come the Fathers of the Church, whose writings were at one time universally, and by a large part of Christendom still are, deemed to enjoy a high measure of authority. They may be compared to those early Musulman writers from whom the traditions of Islam descend, or to the early recorders of and commentators on those traditions. The Fathers, however, did not generally affect to lay down positive rules, but were occupied with exhortation and discussion. Neither out of their treatises could a body of law be framed, nor did any one think of doing this till long after their day. Even then it was as guides in doctrine and discipline, not as the source of legal rules, that they were usually cited.

Christianity began its work not only apart from all the organs of secular power, but in the hope of creating —indeed for a time, in the confidence that it would create—a new society wherein brotherly love should replace law.

Before long it incurred, as a secret society, the suspicion and hatred of the secular power, and had indeed so much to suffer that one might have expected its professors to conceive a lasting distrust of that power in its dealings with religion. This, however, did not happen. So soon as the secular monarch placed his authority at the disposal of the Church, by this time organized as a well-knit hierarchy, the Church welcomed the alliance, and began ere long to invoke the help of carnal weapons. This was the time when she might in her growing strength have been tempted to impose her

precepts upon the community in the form of binding rules. But the field was already occupied. She was confronted and overawed by the majestic fabric of the Roman law. In the East that law continued to be upheld and applied by the civil authorities. In the West it suffered severe shocks from the immigration of the barbarian tribes; but as it was associated with Christian society, the Church clung to it, and was in no condition for some centuries to try to emulate or supersede it. When the time of her dominance came in the eleventh, twelfth, and thirteenth centuries, she did indeed build up a parallel jurisdiction of her own, with courts into which laymen as well as clerks were summoned, and she created for these courts that mass of decrees, almost rivalling the Civil Law in bulk and complexity, which we call the Canon Law. In the canon law there may seem to be an analogue to the sacred law of Islam. But the resemblances are fewer than the differences. The canon law never had any chance of ousting the civil law, which had already entered on a period of brilliant development and potent influence at the time when the decrees of earlier Councils and Popes were beginning to be formed into a systematic digest of rules; and temporal rulers were generally able to hold their own against Popes and archbishops. Moreover the canon law, being partly based on or modelled after the Roman civil law, escaped some of the faults that might have crept into it had it been erected on a purely theological foundation. The Church was already so secularized that its law was largely secular in spirit, and ecclesiastical jurists were at least as much jurists

as they were churchmen. The question propounded in the twelfth century, whether an archdeacon could obtain salvation, shows that the churchman who betook himself to legal business was deemed to be quitting the sphere of piety. Thus law, canon as well as civil law, remained law, and religion remained religion. The canon law is the law of the Church as an organized and property-holding society or group of societies. It is the law for dealing with spiritual offences. It is the law which regulates certain civil relations which the Church claims to deal with because they have a religious side. But there is no general absorption of the civil by the ecclesiastical, no general lowering of the spiritual to the level of the positive, the external, and the ceremonial. In the fifteenth and sixteenth centuries the New Learning and the great ecclesiastical schism removed the danger, if danger there ever was, that there should descend upon Christianity that glacial period which has so long held Islam in its gripe.

XIV

METHODS OF LAW-MAKING IN ROME AND IN ENGLAND

Introductory.

The relations borne by the growth and improvement of the law of a country to that of the constitutional development of that country as a State are instructive in many aspects—instructive where the lines of progress run parallel to one another, instructive also where they diverge. I propose in the following pages to consider them as they concern the organs and the methods of legislation at Rome and in England. The political side of this subject is a very large one, indeed too large to be discussed here, for it would involve a running commentary upon the general history of these two States. I will only remark that the inquiry would show us, among other things, the fact that the progress of Rome from a republic, half oligarchic, half democratic, to a despotism, did not prevent the phenomena which mark the evolution of its legislation from bearing many resemblances to the evolution of legislation in England, where progress has been exactly the reverse, viz. from a strong (though indeed not absolute) monarchy to what is virtually a republic half democratic, half plutocratic. The present inquiry must be confined to the legal side of the matter, viz. to the Organs and the Methods of Legislation regarded not so much as the results of political causes, but rather as the sources

whence law springs and the forces whereby it is moulded.

The working of these Organs and Methods may be studied, and their excellence tested, with regard to both the aspects of law itself, its Substance and its Form. The merit of a system of Law in point of Substance is that it be righteous and reasonable, satisfying the moral sentiments of mankind, giving due scope to their activity, securing public order, and facilitating social progress. In point of Form, the merit of Law consists in brevity, simplicity, intelligibility, and certainty, so that its provisions may be quickly found, easily comprehended, and promptly applied. Both sets of merits, those of Substance and those of Form, will depend partly on the nature of the persons or bodies from whom the Law proceeds, that is the Organs of Legislation, partly on the Methods employed by those persons or bodies. But the merits of Substance open up a field of inquiry so wide that it will be better to direct our present criticism of Organs and Methods chiefly to those excellences or defects of the law which belong to its form. I propose to consider these as they worked in Rome, and have worked down to and in our own time in England, assuming the broad outlines of the legal history of both States to be already known to the reader, and dwelling on those points in which a comparison of Rome and England seems most likely to be profitable.

I. Law-Making Authorities in General.

First let us see what, speaking generally, are the authorities in a community that make the Law, and

How—that is to say, by what modes or through what organs, they make it.

Broadly speaking, there are in every community two authorities which can make Law:—the State, *i.e.* the ruling and directing power, whatever it may be, in which the government of the Community resides, and the People, that is, the whole body of the community, regarded not as organized in a State, but as being merely so many persons who have commercial and social relations with one another. There is, to be sure, a school of juridical writers which does not admit that the people do or can thus make Law, insisting that Custom is not Law till the State has in some way expressly recognized it as such. But this view springs from a theory so incompatible with the facts in their natural sense, that a false and unreal colour must be put upon those facts in order to make them fall in with it. It is unnecessary to pursue a question which is apt to become merely a verbal one. Let it suffice to say that Law cannot be always and everywhere the creation of the State, because instances can be adduced where Law existed in a country before there was any State; and because the ancient doctrine, both of the Romans and of our own forefathers—a doctrine never, till recently, disputed—held the contrary. A great Roman jurist says, with that practical directness which characterizes his class, 'Those rules, which the people without any writing has approved, bind all persons, for what difference does it make whether the people declare their Will by their votes or by things and acts[1]?' This is the universal view of the Romans,

[1] Julian in *Dig.* i. 3. 32.

and of those peoples among whom the Roman law, in its modern forms, still prevails. And such has been also the theory of the English law from the earliest times.

Now the State has two instruments or organs by which it may legislate. One is the ruling Person or Body, in whom the constitution expressly vests legislative power. The other is the official (or officials), whether purely judicial, or partly judicial and partly executive, to whom the administration of the law is committed, and whom we call the Magistrate. This distinction does not refer to the instances in which legislative authority is, by an act of the Governing Power, specially delegated to some magisterial person or body. Those instances are really to be deemed cases of mediate or indirect legislation by the supreme Government (like the power given by statute to a railway company to make by-laws). The position of the Magistrate is different, because judicial administration, and not legislation in the proper sense, is the work he has been set to do.

Similarly the People have two modes of making Law. In the one they act directly by observing certain usages till these grow so constant, definite, and certain that everybody counts upon them, assumes their existence, and feels sure that they will be recognized and enforced. In the other they act indirectly through persons who have devoted themselves to legal study, and who set forth, either in writing or, in earlier times, by oral discourse, certain doctrines or rules which the community accepts on the authority of these specially qualified students and teachers. Such men have not necessarily either any public position or any direct commission from the State. Their views may rest on

nothing but their own reputation for skill and learning. They do not purport to make law, but only to state what the law is, and to explain it; but they represent the finer and more highly trained intellect of the community at work upon legal subjects, just as its common and everyday understanding, moved by its sense of practical convenience, is at work in building up usages. So the maxims and rules these experts produce come to be, in course of time, recognized as being true law, that is to say, as binding on all citizens, and applicable to the decision of disputed questions.

Taking then these four Organs or Sources, we find that one Source—the People, as makers of Customary Law—is so vague and indeterminate that one can say little about it as an Organ, though the process by which Custom makes its way and is felt to be binding is a curious process, well deserving examination. Two remarks may however be made on it. The first is this, that it is essential to the validity of a rule claimed to have been made by Usage that it shall possess a certain extension in Time and a certain extension in Space. It must have prevailed and been observed for so long a period that no one can deny its existence. It must have prevailed over so wide an area, that is to say, have been used by so many persons, that it cannot be alleged to be a merely local usage, unknown outside the locality, and therefore not approved by the tacit consent of the community at large. (The size of the area is of course in each case proportioned to the size of the whole community. A custom observed by a population of a few thousand people in a canton of Switzerland may make the custom law for the canton, though observance by a

similar number would not make a similar custom law for a large country like Bavaria.) The other remark is that sometimes the observance of a custom by a particular class of the community, as for instance by agriculturists or merchants, may suffice to establish the rule for the community at large[1]. This happens where the custom is by its nature such that only agriculturists or merchants (as the case may be) would need to have a custom on the matter at all. Universality of practice by them is then sufficient to make the custom one valid for the whole community, which may be taken to have tacitly approved it. Sometimes, however, the usage of a particular class is deemed to become law by its being imported as an implied condition into legal transactions, especially contracts, entered into by members of that class; and this view has been frequently taken by our English Courts of mercantile usages, which they have in the first instance enforced rather as unexpressed elements in a contract than as parts of the general law. It need hardly be added that the fact that the meaning and extent of a rule of Customary Law are often uncertain, and give rise to judicial controversy, does not prevent the rule itself from being valid previous to its determination in such controversy, for this is exactly analogous to a disputed question regarding the interpretation of a statute. Though the meaning of a statute may have been doubtful until determined by the Courts, the statute was operative from the first, and is rightly applied to ascertain the validity of rights which accrued before its meaning was determined.

[1] The 'Ulster Custom' is an interesting instance, but it never quite got the length of becoming law.

We have thus to examine three Sources of Law—the Governing Person or Body, the Magistrate, and the Jurists or Legal Profession. These are the three recognized and permanent legislative organs of a community. Every mode of creating law discoverable in any organized community may be reduced to one of these, and in most civilized communities all of these may be found co-existent. Sometimes, however, one or other is either absent or is present in a quite rudimentary condition. In the East, as for instance in such countries as Turkey or Persia, there is little that can be called general legislation. Hatts are no doubt occasionally promulgated by the Sultan, though they are sometimes not meant to be observed, and are frequently not in fact observed. So far as new law is made, it is made by the learned men who study and interpret the Koran and the vast mass of tradition which has grown up round the Koran. The existing body of Musulman law has been built up by these doctors of law during the last twelve centuries, but chiefly in the eighth and ninth centuries of our era: and a vast body it is. The Kadi or judge is himself a lawyer, and he might mould the system by his decisions, but decisions are not reported, and the authority of a Kadi is deemed lower than that of one of the more learned Muftis or doctors of the law. On the other hand there are countries, such as Russia for instance, where the direct promulgation of his will by the Sovereign is the only recognized form of legislation, the decisions of judges and the opinions of legal writers enjoying a much lower authority. In other countries, as in Germany, legal writers are numerous and influential,

but the magistrates, their decisions having been but little reported, have, till our own time, held for the most part a subordinate place, and played a comparatively small part in the development of law. This was at one time the case in France also, where cases decided by the higher courts of law used to stand little, if at all, above treatises composed by legal writers of established reputation. Nowadays, however, cases are more fully reported, and an authority is accorded to decisions scarcely lower than that which they have long enjoyed in England and America.

At Rome, and also in England, all these three main Sources or Organs have existed in full force and efficiency, though not in equal efficiency at different periods in the history of either State. At Rome, as in England, we begin with customary law. The customary law of the Quirites is known to and administered by a small privileged class; and so far as there is any legislation at all, it is the work of members of this class who carry in their minds and expound and insensibly amplify the sacred traditional ordinances. Then direct legislation by the people in their assemblies, and afterwards (though in its germ perhaps almost concurrently) the law-making action of the magistrate begin to appear. They go on hand-in-hand for many centuries, seconded by the never intermitted labours of the jurists, until at last the magistrate's work is over, the jurists have lost their impulse or their skill, and the direct activity of the Sovereign (who is by this time a monarch) becomes the chief surviving fountain of law. I propose to take these three sources and compare the way in which they acted in the Roman city and Empire with their action

and development—in many respects parallel, in a few respects contrasted—in England, whose law has now spread over a large part of the British Empire.

II. Jurists as Makers of Law.

Let us begin with the Jurists, since they are the first repositories and interpreters of those customs out of which law grew. One may distinguish three stages in their attributes and their action at Rome. In the first stage, during the days before the enactment of the Twelve Tables, and even after that date down to the third century B.C., they were a small body of men, all of them patricians, and some of them priests, retaining in their memory and transmitting to their disciples a number of rules and maxims, often expressed in some carefully phrased and scrupulously guarded form of words, such as the *lex horrendi carminis*, which Livy quotes in his account of the trial of Horatius for killing his sister[1]. An important place among these rules was held by the formulas which it was necessary to use in actions or other legal proceedings, the slightest variation from the established phraseology of which would be a fatal error. Such knowledge, with the connected knowledge of the days on which ancient superstition forbade or permitted legal proceedings to be taken, was in these early times strictly reserved by its possessors to their own class, as a sacred deposit of political as well as religious importance.

In the following period, which may be said to extend till the end of the free Republic, these restrictions vanished. The progress of the plebeians in political

[1] Book i. chap. 26.

power as well as in wealth made it impossible to exclude them from the possession of legal lore. Some plebeians became no less distinguished as sages of the law than patricians had been; indeed Tiberius Coruncanius, the first plebeian chief pontiff, is occasionally described as the founder of the later school of scientific lawyers. He is said to have been the first person who offered himself to the public as willing to advise on legal questions. The profession attracted many able and ambitious men, because it was one of the three recognized avenues to high office, the alternative to arms and to political oratory. One may fairly call it a profession in this sense, that those who adopted it made it the main business of their life, and by it won their way to fame and influence. But it was not such a profession as the bar is in modern countries, not a gainful profession whereby a fortune could be amassed, not a close profession into which entrance is granted only upon definite terms and subject to definite responsibilities. Any man who liked might declare himself ready to give legal advice or settle legal documents. He had no examination to pass, no fees to pay, no dinners to eat. He acquired no right of exclusive audience of the Courts; he became amenable to no jurisdiction of his compeers or of any constituted authority. The absence of these things did not, however, prevent the Roman lawyers from having a good deal of what might be called professional feeling, a high sense of the dignity of their calling, and a warm attachment to the old forms and maxims of the law. These Republican jurists composed treatises, only a few scattered extracts from which

have come down to us, and gave oral teaching to the disciples who surrounded them while they advised their clients, as they sat in state in the halls of their mansions.

With the fall of the Republic there begins a third period which covers about three centuries. It had been the custom for a man who had a point of law to argue before a *iudex*[1] trying a case to endeavour to obtain from some eminent jurist an opinion in his favour, which he produced to the *iudex* as evidence of the soundness of the view for which he was contending. Now Augustus, partly to enlarge and inspirit the action of the jurists, partly to attach them to the head of the State, permitted certain of the more eminent among them to give *responsa*, *i.e.* answers or opinions on points of law, under and with his authority, directing such opinions, when signed and sealed, to be received by a *iudex* trying a case as settling a controverted point. His successor, Tiberius, issued formal commissions to the same effect[2]. Here we enter the third stage, for from this time forward not only did it become obligatory on the *iudex* to defer to an opinion given by one of the 'authorized' jurists, but there was also created an inner privileged order within the whole body of jurists, this inner order consisting

[1] The *iudex* (who is not to be thought of at this period as a judge in our sense—he is more like a jury of one, or a referee) was not necessarily a skilled lawyer, and therefore was presumably not competent to decide a knotty technical point by the force of his own knowledge.

[2] The precise nature of the action taken by Augustus and Tiberius is the subject of some controversy, as to which see Goudy's edition of Muirhead's *History of Roman Law*, p. 292, Sohm, *Institutionen*, § 18, and Krüger, *Geschichte der Quellen des Römischen Rechts*, § 15. *Responsa* had been given in earlier days by the *Pontifices*, and Augustus was *Pontifex Maximus*. As to a similar practice among Muslims see Essay XIII, p. 239 *ante*.

of those, usually no doubt the most conspicuous by learning and ability, who had obtained the imperial authorization. And out of this privileged class the Emperor was apparently accustomed to choose the great judicial officers of state, the praetorian prefect—in later times the quaestor also—the members of the Imperial Council, and possibly the chief judicial magistrates of the provinces, so that the career of a jurist continued to be, though in a somewhat different form, one of the main paths to distinction and power. Oratory, which had formerly swayed the people, was now practically confined to the Senate and the Law Courts, and thus became separated from politics: for even in the Senate few ventured to speak with freedom. As the profession of law was now the chief rival to the profession of arms it drew to itself a large part of the highest ability of the Empire. After the great decline in literature and art which marks the period of the Antonines, the standard of learning, acuteness, and philosophical grasp of mind among the jurists still continued to be high. Even their Latin style is more pure and nervous than we find among other writers of the third century. The period of their productive activity—that which we commonly call the classical period of Roman Law—may be said to close with Herennius Modestinus, who was praetorian prefect about the middle of the third century of our era. Thereafter we possess only a few names of notable jurists, scattered at long intervals, and apparently inferior to their predecessors.

Although throughout these three periods the jurists may fitly be described as a Source of Law, their function was by no means the same from the beginning till the end.

In the first period they were the depositaries of a mass of customs which changed very little; and they did not so much create law as give a definite shape and expression to it in the carefully phrased rules and unvarying formulas which each generation handed down to the next. The events and circumstances of the second period, which saw the knowledge of the old customs much more widely diffused, and saw also a considerable growth of statute law, threw upon them the duty of expounding both customs and statutes, and of covering the ground which neither customs nor statutes had occupied. This meant a good deal in a thriving and expanding community, so the *interpretatio iuris* (as the Romans call it) which they describe as the chief service rendered by these legal sages, became large in quantity, though it was almost entirely confined to the filling up of interstices, and did not attempt to produce new principles or lay down broad rules. Its authority, moreover, was a purely moral authority, based upon nothing but the respect paid to the intellect and learning of the particular jurist from whom some doctrine or dictum emanated, regard being of course had to the length of time during which, or the approval of the profession with which, a doctrine or dictum had been accepted. With the introduction in the third period of a specific commission from the Emperor, the jurist, that is the authorized jurist, became recognized as competent to make law (*iuris conditor*). He acted only by interpreting, *i.e.* by delivering an opinion on a point previously doubtful, but his decision, once given, had an authority independent of his personal fame, the authority of the Emperor himself, by this time a source of law

through the magisterial powers conferred upon him for life. Let us note further, that whereas in the earlier part of the second period it was largely through the modelling of the system of actions and pleading that the influence of the jurists was exerted, in the later part of that period and during the whole of the third, it was chiefly by means of their writings that they developed the law. Most of these writings were the work of men who enjoyed the *ius respondendi*; yet some of those who belong to a time before that right began to be granted carry no less weight. Antistius Labeo does not seem to have enjoyed it, but he is always quoted with the greatest respect, and it seems doubtful whether it was possessed by Gaius, who was, centuries after his death, placed among the five most authoritative writers.

It does not here concern me to enlarge upon the labours of the great legal luminaries of the earlier Empire, either as writers of treatises (it is in this capacity that we know them best, from the fragments of their works preserved in Justinian's *Digest*) or as advisers of the Sovereign, assessors in his supreme Court of Appeal, and prompters of his legislative action. For the present purpose it is sufficient to suggest some reasons which may account for the more considerable part which the Roman jurists played as a source of law than that which can be attributed to legal writers in England. Though some few of our English treatises are practically law, constantly cited and received as authorities—Coke upon Littleton supplies an example from former times, and Lord St. Leonards on Vendors and Purchasers from our own—they are not to be compared in point of quantity or

importance with the text-books out of which Justinian's compilation was framed. In earlier days it was no doubt different. The writings of Glanvill and Bracton, with the book ascribed to Britton and the treatise called Fleta, were all to some extent recognized as law in the fourteenth century; that is to say, they would have powerfully, and in most doubtful cases decisively, influenced the mind of any judge to whose knowledge they came when he had to determine a point of law. In that age there was no such distinction drawn between what is and what is not legally binding as the wider experience and the more precise analysis of modern times has made obvious to our minds. Moreover, in an age when customs were still uncertain, because largely fluid and imperfectly recorded, the statement of what a writer held to be law had an incomparably greater force than in later days. And it may be added that the extracts from the Roman Law, of which Bracton's treatise, for instance, is full, would, at least to the ecclesiastical lawyers, carry with them the authority of the Roman law itself. After the fifteenth century, comparatively few books hold a place of authority; and perhaps the best example of those which do is Littleton's *Treatise on Tenures.* By this time the abundance of reported cases began to make it less necessary to have recourse to treatises; nor was the writing of them a favourite occupation of the earlier common lawyers.

III. Difference between the Action of Roman and that of English Jurists.

What are the causes of this singular difference between the course of legal development in England

and that which it took in Rome? The most obvious is the different position in which the imperial commission placed certain of the more eminent jurists. They were thereby practically erected into legislators, for their formally expressed opinions were treated as though proceeding from the Emperor himself, and the Emperor was from the first virtually, and afterwards technically also, a fountain of legislation. True it is that this authority was not at first extended to the treatises of these jurists. It attached, at least in earlier days, only to the *responsa* which they had authenticated by their seal, and a *responsum* probably carried authority only for the particular case in which it was delivered. But nothing was more natural than that its weight should be accepted for all purposes, and that the utterances of the privileged jurists, whether contained in a collection of *responsa* or in any other kind of law-book, should command a deference seldom yielded to any private writer, however eminent. Nor does the fact that both in their *responsa* and in their other writings these jurists differed from one another, maintaining opposite views on many important points, seem to have substantially detracted from their influence. Such divergences were indeed, down to Justinian's time, a source of embarrassment to practitioners and judges. Looking at the thing as a matter of theory, we may wonder how the inconvenience could have been borne with, for unless a statute was passed settling a controverted point, the point might remain always controvertible. But this is one of the many instances in which we find that a system which seems, when regarded from outside,

unworkable, did in fact go on working. Probably, when the controversy was one of importance, there came after a time to be a distinctly preponderating view, which practically settled it; and possibly the sense of responsibility under which the authorized jurists wrote contributed to make them not only careful but guarded and precise in the statement of their conclusions.

Another cause for the greater relative importance of the Roman jurists as creators or moulders of law may be found in the social position of the legal profession at Rome. In England the profession is and always has been followed primarily as a means of livelihood. Out of the many who have failed to find it remunerative, some few have devoted themselves to study and have enriched our jurisprudence by valuable treatises. But the general tendency has been for the men of greatest mental vigour and diligence, and also for the men of the widest practical legal experience, to be so completely absorbed by practice as to have no leisure for the composition of books. English law-books are written mostly by young men who have not yet obtained practice, or by older men who through the negligence of Fortune, the undiscernment of solicitors, or perhaps some deficiency in practical gifts, have never succeeded in obtaining it. In some remarkable instances they are the work of persons whose eminence has raised them to the judicial bench. But they are hardly ever written, and indeed could scarcely be written, by the men in full practice, yet such men have the great advantage of being in daily contact with the working of the law as a concrete system, and they

include, not indeed all, but a great part of the best legal talent of each generation. At Rome, however, the jurist of republican days, making no gain from his professional work, and not needing it, for he was a man of rank and means, took practice more easily, and devoted a good deal of his time to the literary side of his life. Thus we are told that Labeo spent half his year in Rome giving instruction to his disciples and advice to his clients, the other half in the country composing his admirable treatises. Under the Empire the profession doubtless attracted a large number of persons of lower station and smaller means. But the habit of writing and of teaching went on among the leaders.

In this habit of teaching we may find a further reason for the prominence of the jurist. The giving of oral instruction in law to those who were preparing themselves for its practice, was at Rome always an important branch of a jurist's activity. Cicero tells us how he and others among the youth of his own generation stood as disciples round the chair of Mucius Scaevola, gathering the crumbs of legal wisdom which dropped from his lips, putting questions and doubtless taking notes of the explanations which the sage deigned to give. Other leading luminaries were surrounded by similar groups. Two centuries later, Gaius is generally thought to have been a teacher of law, and won his high reputation largely by the educational treatise which has come down to us. And in still later times the two great law schools of Beyrut and Constantinople were the chief homes of legal learning, and those who lectured in them among the chief legal lights of the

Roman world. Four members of the Commission which prepared the Digest were chosen by Justinian from among these teachers, and given the place of honour next after Tribonian, the president of the Commission. In England, on the other hand, legal teaching had during the last century and a half fallen sadly into abeyance, and has only within the last few years shown signs of reviving. Yet it is clear that the practice of teaching is of the utmost value for the composition of treatises, not only because it supplies a motive and an occasion, but also because it tends to make a book more systematic and lucid, since the teacher feels in lecturing the paramount necessity of logical arrangement and of clear expression. The best survey, at once concise and comprehensive, of English law that has ever appeared—Mr. Justice Blackstone's book—was founded on oral lectures given in Oxford: and the great works of Chancellor Kent and Justice Story in America had a like origin. The merits of these two last-named writers are just the kind of merits which the habit of teaching tends to produce. Nor ought we to forget a more recent example, the small but eminently acute and suggestive volume of lectures on the Common Law of Mr. Oliver Wendell Holmes, now Chief Justice of Massachusetts.

The main cause of the smaller number in England of legal writers who have taken rank as Sources of Law, is doubtless to be sought in the fact that the highest juridical talent of the most experienced men has with us poured itself through a different channel, finding its expression in the decisions of the Judges. It is our series of Reported Cases, now swollen to

many hundreds of volumes, a mass of law so large that few lawyers possess the whole of it, that really corresponds to the treatises of the great Roman jurists. The Reports fill a place in English legal studies corresponding in a general way to that which those treatises filled in the Roman Empire. They are the work of a similar class of men, those who from active practice have risen to the highest places in the profession. Men in such a position have rarely the leisure to occupy themselves with writing law-books, nor have they usually an impulse to do so, since what they have to say can be adequately delivered in their spoken or written judgements. And though the merits of our English judicial decisions are not altogether the same as those of the great Roman text-books, still the judgements of the most eminent judges will, if taken as a whole, bear comparison either with those text-books or with any other body of law produced in any country. In logical power, in subtle discrimination, in breadth of view, in accuracy of expression, such men as Lord Hardwicke, Lord Mansfield, Lord Stowell, Sir William Grant, Mr. Justice Willes, Sir George Jessel, Lord Cairns, and Lord Bowen, to take a few out of many great names, may fairly rank side by side with Papinian or Ulpian, with Pothier or Savigny.

This is not the place for an attempt to estimate the respective advantages of case law and text-book law. But it may be remarked that they have more in common than might at first sight appear. English text-books are almost entirely a collection of cases with comments interspersed. Sometimes a general rule is stated which may go a trifle further than the

cases do; sometimes an opinion is thrown out on a point not covered by authority. Still the cases are the gist of the book. I have heard an eminent judge[1] of our own time observe that the easiest way to codify the law of England would be to enact that some eight or ten established text-books, such, for instance, as Jarman on Wills, Chitty on Contracts, Williams on Executors, Lindley on Partnership, Smith's Mercantile Law, Sugden on Powers, Smith's Leading Cases, Hawkins on the Interpretation of Wills, Dicey on Domicil, should have the force of statutes. To do this would add little to the volume of the existing English law, for the text-books mentioned are in reality digested summaries of decisions that lie scattered through the Reports. And similarly the treatises of the Roman lawyers contain a large number of cases, *i.e.* opinions given by eminent lawyers upon sets of facts laid before them or imagined by them in order to show the application of a principle. The Romans themselves attribute high authority to a concurrent line of decisions[2]; and doubtless decisions given by magistrates or by emperors found their way into, and influenced the text-books, though we do not know what means were taken of recording them. In fact the difference between the English and the Roman system resides chiefly in two points. With us the binding force of a rule depends on its having been actually applied to the determination of a concrete case. With the Romans an opinion delivered in a *res iudicata* is not necessarily weightier than if it was delivered in any other way. It is valid simply because it proceeds from a high juridical authority. Probably in early imperial

[1] The late Lord Justice W. M. James.

[2] *Dig.* i. 3. 38.

days there was a difference between the force of a jurist's *responsum* signed, sealed, and produced to a *iudex*, and an opinion expressed in any other way by the same jurist, like our distinction between so much of a judgement as is needed for the decision of the case and the accompanying *obiter dicta*. But any such difference seems to have presently disappeared. And secondly, while the opinions on points of law of English jurists are scattered here and there over hundreds of volumes, with only a chronological arrangement, those of Roman jurists were gathered into systematic treatises.

The Roman system has the merits of logical arrangement, of consecutiveness, of conciseness; the English, wanting these, has advantages in being so copious as to cover an immense variety of circumstances, and in consisting of opinions delivered under the stress of responsibility for doing justice in the particular case. It presents moreover to students an admirable training in the art of applying principles to facts. Both systems have the defect of uncertainty, because under both there may be a conflict of views resting on equal authority. Broadly regarded, both may be said to spring from the same source. According to German writers, the law made by the jurists springs from what these writers call the 'legal consciousness of the people,' and derives its ultimate authority from Custom, *i.e.* from the tacit acceptance by the people of certain doctrines and rules. We in England dwell upon its formal recognition by the Courts as the proof of its authority. But in both cases that which becomes recognized as law has passed through and been shaped in the workshop of Science. It is the learning and skill of trained professional

students, whether English judges or Roman text-writers, that has done the work which the people, or the Courts for the people, have accepted.

IV. Magistrates and Judges as Makers of Law.

We come now to consider the second of the three great sources of law, the Official or Magistrate. He holds an intermediate place between the Jurist on the one hand, and the Supreme Power, whether an Emperor or a Parliament, on the other, speaking with more of plenary authority than the former and with less than the latter. He may at first sight appear to be not really a species by himself, but merely a particular instance of legislation by the Supreme Power in the State, acting not directly (*i. e.* not as itself enunciating legal rules) but mediately, by delegating its function of legislation to a person clothed with its authority and speaking in its name.

This view has in fact been held by some writers. That it is, however, an erroneous view will appear, when we come to scrutinize the Roman facts as the Romans understood them, and the English facts as they were understood in the fifteenth century. Delegation by the supreme legislative authority to some officer or magistrate no doubt may, and frequently does, take place. In England, for example, Acts of Parliament sometimes commit the duty of making rules to an official, such as the Lord Chancellor, or to such a body as the Council of Judges of the Supreme Court of Judicature, or to the Privy Council, that is to say, to a Minister advised by his permanent official staff, who

procures the approval of the Crown in Council to what he issues in the form of an Order in Council[1]. Where the function is so delegated, the rules or ordinances made in pursuance of the statute have the full force of the statute that gave power to make them. Here the phenomenon is too common and too simple to need explanation or discussion. It is quite another thing to maintain that the legislative action of the Magistrate is always of this character, a mere instance of the exercise of delegated power. The view is not historically true of the Roman Magistrate—Praetor, Censor, Aedile, or whatever else he may be, firstly because he did not in fact receive any such delegation from the people; secondly, because nobody supposed him to have received it. He was always distinctly conceived of as acting by his own authority, whatever that may be, a matter to which we must presently return. It is not true of the English Judge—whether of the *iudices terrae* of the Common Law Courts when they take shape in the twelfth and thirteenth centuries, or of the Chancellor of the fifteenth, or of indeed their modern successors, seeing that the theory of the English law and constitution has remained in these points, at least, substantially unchanged. That theory is that the judges of the Common Law Courts are nothing more and nothing less than the officers who expound and apply the Common Law, a body of usages held to be known to the people and by which the people live, usages which existed, in their rudimentary state, as far back as our knowledge extends, most of which have not been formally embodied in any legisla-

[1] Orders in Council are also issued in certain cases under the prerogative of the Crown without statutory delegation.

tive act, but which have been always recognized as binding. Such customary rules are not law because they are declared to be so by the judges; on the contrary the judges enforce them because already, antecedently to their decision, binding law. The judges have never received delegated authority from Parliament. So far as authority has been delegated to them it is the authority of the Crown. But the Crown cannot empower them, and never purported to empower them, to make the law. This is abundantly clear regarding the Common Law Courts, who are merely the exponents of the customs of the land.

The case of the mediaeval Chancellor is rather different. He is rather more than an exponent of the law. He virtually creates law by his executive action. But he does not do so by any expressly delegated power. At a time when it was well settled that the Crown alone could not (except possibly in some few directions—and even this was not admitted by the House of Commons) legislate, Parliament, so far from giving even by implication any authority to the Chancellor, was jealous of and tried to fetter his action. To allege that what are called the legislative functions of any English judge arise from a commission given him by the Supreme Power, *i. e.* Parliament, to exercise them, is an inversion of historic truth and legal doctrine, an attempt to support a false theory by imaginary facts[1]. It is easier and safer

[1] If the view in question is defended as being if not historically true yet a convenient analysis of the actual facts of the case in modern England, the answer is that the Judge, as we know him to-day, can be represented as a delegate of Parliament only by arguing that Parliament commands whatever it does not forbid—a way of making facts square with a pre-conceived theory, which is not only opposed to English traditions, but essentially unreal and fantastic.

to look at our system in the aspect it bore to those who witnessed the earlier stages of its growth, and to recognize the existence of a peculiar form of law-making—that which naturally and inevitably arises out of the application and administration of the law, especially where that law is largely customary, not embodied in formal declarations of a sovereign's will. If therefore we are to have a theory of the position of the Magistrate or Judge, a definition of his functions, we must rather call him (however vague the expression may appear to those who prefer the phantom of precision to the substance of truth) the recognized and permanent organ through which the mind of the people expresses itself in shaping that part of the law which the State power does not formally enact. He is their official mouthpiece, whose primary duty is to know and to apply the law, but who, in applying it, expands it and works it out authoritatively, as the jurists do less authoritatively. He represents the legal intelligence of the nation, somewhat as upon one theory of papal functions the bishop of the old imperial See represents the religious intelligence and spiritual discernment of the Christian community on earth; and therefore, like the Pope, he represents the principle of that development which it is his function to guide. As the Romans call their Praetor the living voice of the law, so is the Magistrate always, in England as at Rome, the voice whereby the people, the ultimate source of law, shape and mould in detail the rules which seem fitted to give effect to their constant desire that the law shall be suitable to their needs, a just expression of the relations, social, moral, and economic, which in fact exist among them. The

Magistrate is by no means their only voice, for they also express themselves, especially upon urgent questions, by direct legislation; and the more they get accustomed to do so, the narrower does the province of the Magistrate become. But there are many things which legislation cannot do in the earlier stages of a State's growth, partly because proper machinery is wanting, partly because political dissensions intervene, partly because legal ideas are still fluid, fluctuating, and unfit for expression in terms at once broad and definite. Moreover, in even the most highly organized States, some things always remain which a legislature cannot conveniently deal with, or where its action needs to be constantly supplemented, and perhaps even corrected, by some organ which can work in a more delicate and tentative manner.

So much—that I may not further illustrate what will become clearer from a survey of the Magistrate as he has appeared in history—may be said of Legislation by a State Official in general, whether he be a Roman *Magistratus* or an English Chancellor. Now let us come to the Roman Praetor.

In the early days both of Rome and of England the administration of justice belonged to the chief magistrate of the State and to the assembly of the people, who in the very earliest days had normally acted together. In England, although the judicial functions of the Assembly survived for some purposes (as they survive to-day in Parliament), the conduct of ordinary judicial work which could not conveniently be exercised by the Assembly passed to the king, and when judges appeared, they were his officers. In Rome also the king was the head

of the judicial system: and when the kingly office was abolished, the functions that had been his were transferred to the two Consuls, who were virtually annual kings. After a time, owing to political disputes which need not be described here, a third annual magistrate was added, called the Praetor[1], who, while capable of exerting nearly all the executive power of the Consuls, received the administration of justice as his special province. As the city grew and litigation increased, more Praetors were added. The first had been appointed in B.C. 367; the second, who presently became charged with suits in which one or both of the parties did not enjoy Roman citizenship, dates from about B.C. 247. He came to be called *Praetor peregrinus*, while the original Praetor was described as the Praetor of the City (*urbanus*). The latter remained the head of the judicial system, and I shall therefore speak of the Praetor in the singular. Other Praetors were added, partly in order to act in the provinces, partly in order to undertake special kinds of jurisdiction. By the time of Trajan there were eighteen of them.

In the later republican period we may speak of the Praetor as being partly a Judge, partly a Minister of Justice who directed the general working of the Courts. It was his duty to issue when he assumed office a statement of the rules by which he intended to guide his judicial action during his year, as well as a table of the formulae in which applications ought to be made to him for the exercise of his functions. These rules were pub-

[1] The name Praetor meant Leader, and was originally applied to the Consuls. The Praetor's competence for military functions was equal to that of the Consuls. He had both *imperium* and *iurisdictio*.

lished in a document called the Edict. It contained a concise statement of the cases in which he would allow an action to be brought, and of the pleas which he would admit as constituting defences to actions. This statement did not purport to supersede the old actions and rules which had either come down as a settled part of the ancient customary law, or had been enacted by any statute of the popular assembly. The Praetor always held himself to be bound by statutes[1]. But his Edict added materially to the old actions and rules, incidentally modified them, ultimately did supersede many of them. He awarded remedies which the older law had not awarded. He recognized defences (*e.g.* in cases of fraud) which the old law had not recognized. He provided means of enforcing rights more effective than those which the old law had provided. As the later Romans said, he acted for the sake of aiding, or supplying the omissions of, or correcting, the old strict law, with a view to the public advantage[2].

Each Edict was valid only for the Praetor's year of office. Each succeeding Praetor, however, usually repeated nearly all the declarations that had been contained in the Edicts of his predecessors, though it often

[1] The Praetor, said the Romans, does not make law (*Praetor ius facere non potest*). Yet they also called the rules which emanated from him *iura* (see Cic. *De Invent.* ii. 22): and the whole body of rules due to his action was in later times described as *ius honorarium, ius praetorium.* Sometimes a right resting on *ius* is contrasted with one depending on the protection (*tuitio*) of the Praetor: Ulpian in *Dig.* vii. 4. 1. Those who put the Praetor's authority highest called the Edict *lex annua,* says Cicero, *Verr.* ii. 1. 42. This uncertainty of language corresponds to the peculiar character of these rules, which in one sense were, and in another were not, Law.

[2] 'Ius praetorium est quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam.' Papinian in *Dig.* i. 1. 7.

happened that a new Edict introduced some improvement in point of form and expression, or perhaps so varied, or added to, the announcements in the last preceding Edict as to introduce an improvement in substance, for when a Praetor thought that it was necessary to promise a new remedy by action, or to recognize a new plea, it was his duty to insert it. In this way the practice of the Courts was continually changing, yet each single change was so slight that the process was very gradual, hardly more rapid than that which has gone on, at certain periods in the history of English law, through the action of the Court of Chancery, or that which went on in the Court of King's Bench under Lord Mansfield. There was no permanent enactment of a new rule, for a Praetor's declarations bound himself only and not his successors[1]. But as his promises were usually repeated by his successors, a Praetor when he promised a new remedy, practically created a new right, or enlarged and confirmed an old one.

To us moderns the function thus committed to a Magistrate seems a large function, and his power a possibly dangerous power. No modern constitutional State would vest such a power either in a Judge or in a Minister of Justice. But to the Romans the Praetor is (above all things) the representative of the

[1] His declarations did not originally, in strictness of law, bind even himself, and it was found necessary to enact, by a *lex Cornelia* of B.C. 67, that the Praetor should not depart from the statements of his Edict ('ut praetores ex edictis suis perpetuis ius dicerent, quae res cunctam gratiam ambitiosis praetoribus qui varie ius dicere solebant, sustulit.' Ascon. *in Cic. Pro Cornelio*, 58.

The Edict regularly issued at the beginning of each year was called *Edictum perpetuum*, as opposed to *Edictum repentinum*, one issued for an emergency.

Executive and Judicial Power of the State. He is the State embodied for certain purposes. He is something more than a mere minister, whom the people have chosen to serve them in a certain capacity. He represents the majesty of the State over against the people, and deals with them rather as a Ruler than as a Servant. Few nations have formed so strong and definite a conception of State power as the Romans did; and none, perhaps, expressed it so distinctly in the authority, very wide, very drastic, and yet eminently constitutional, which they entrusted to their great State officials. The conception was to them so dear, or so necessary, that even when the misdeeds of a monarch had led to the abolition of monarchy, they did not restrict the magisterial power itself, but divided it between two co-ordinate magistrates whose co-existence made each a check on the other; and when the powers of these two (the Consuls) were subsequently found to need limitation, they devolved upon other magistrates (the Tribunes) the right to step in and check the exertion in some particular instance of the consular power.

The Praetor, therefore, having (like the Consul) *imperium* (*i.e.* the power of issuing commands as an executive officer, and of compelling obedience to them by putting forth material force), is a stronger personality than the English Common Law Judge, and can act more boldly and more effectively. We hear of no demand for a restriction of his functions, but only of a statute which checked arbitrary discretion by requiring him to administer the law in accordance with his Edict. Moreover, while the English judge is, down till the Revolution, an official removable by the Crown, the Praetor

has no one over him, and has, therefore, not only a more unfettered discretion in carrying out his judicial and quasi-legislative mission, but also a clearer sense of his duty to do so, because this is the function which the nation expects him to discharge. The English Judge is primarily a judge, appointed to pronounce a decision: the Praetor is also an executive magistrate, placed at the head of the whole judicial administration of what was originally a small community, with the duty of providing that the system works properly. His wider powers give him a sense of the obligation laid on him to see that justice is duly done, that the system of procedure is such as to enable justice to be done, that wrongs for which there ought to be some remedy have some remedy provided against them; in short, that the law as a machinery for setting things right and satisfying the demands of the citizens is kept in proper order, with such improvements and extensions as the changing needs of the nation suggest. His business is not merely to declare the law but to keep the law and its machinery abreast of the time.

The functionary who in England offers the nearest analogy to the Praetor, an analogy which has been so often remarked that only a few words need be spent on it, is the Chancellor. The Chancellor of the fourteenth, fifteenth, and sixteenth centuries was the organ of the prerogative of the Crown on its judicial side, and as that prerogative was then very wide, he was thus invested with an authority half judicial, half administrative, not unlike that of the Roman magistrate. As it belonged to the Crown to see that justice was done throughout the realm, and the means for doing it provided, the

Chancellor was expected and obliged to supply new machinery if the old proved inadequate, and this he did in virtue of an authority which, in its undefined width and its compulsive power, resembled the Roman *imperium.* Accordingly when the development of the Common Law Courts stopped in the fourteenth century because the Common Law judges refused to go beyond the remedies which the Courts provided, and made only a limited and timid use even of their power of issuing new writs *in consimili casu*, the Chancellor went on. From the time of Edward the Third petitions to see right done, which had been previously addressed to the Crown, began to be addressed to the Chancellor, and the extraordinary range of his powers was expressed by the phrase that he acted in matters of the King's grace and favour, that is to say, he acted where the subject could not demand a remedy as of common right from the ordinary Courts of the land. Thenceforward the range of action of the Common Law Courts did not so much need to be extended, though a certain slight measure of development continued in them even as late as the days of Lord Mansfield, whose extension of the scope of the 'Common Counts for money had and received to the use of the plaintiff' has a faint flavour of praetorian methods. It was partly because the Common Law judges had halted that the Chancellor, if I may use a familiar expression, took up the running, and exerted the powers which the sovereign entrusted to him, and which, as keeper of the sovereign's conscience, he was held to be justified in exerting so as to provide fresh and efficient remedies for wrongs that defied either the rigid system of procedure or the feeble

executive capacity of the Common Law Courts. During this period the Chancellor, though a judge, is also much more than a judge, and it is as a great executive officer, clothed with the reserved and elastic powers of the sovereign, that he is able to accomplish so much. Yet his action is not so free as was the Praetor's, for he does not directly interfere with the pre-existing Courts. He may walk round them: he may forbid a plaintiff to use the judgements they give; but he cannot remould their methods nor extend their remedies. The Praetor, on the other hand, is in a certain sense the head of all Courts, so that his action covers the whole field of law. After a time, however, the creative energy of the Chancellor slackens, partly because the prerogative of the Crown was being narrowed, partly, apparently, from the example of the other Courts, for when Chancery decisions also began to be reported like those of other tribunals, he naturally felt himself more and more fettered by the record of the decisions of his predecessors. In the eighteenth century, precedents gather round the Chancellor and fence him in: he cannot break through so as to move freely forward on new lines of reform. He is like a stream which, as it deepens its channel, ceases to overflow its banks.

Before I note a further point of difference between the Praetor and our English Judiciary, and a further reason why the development of the law by the latter was so much less bold, I must advert to one feature which the Roman and English systems have in common. In both law is made through the control of procedure. The Praetor promises to give a certain action, or allow a certain defence, in certain states of fact; *i.e.* if a plaintiff

alleges certain facts, the Praetor will allow him to sue, and will see that judgement is given in his favour should those facts be proved, while if a defendant alleges certain facts, the Praetor will allow these to be set forth in a plea, and will see that judgement is given in his favour if the facts as stated in the plea are proved. Similarly the English Courts are concerned not with abstract propositions of law, but with remedies. It is by granting a remedy, *i. e.* by entering judgement for the plaintiff or the defendant in pursuance of certain reasons which they deliver publicly, that the Courts become sources of law. And though the Chancellor goes further than the Common Law Courts, because in the early days of his action he laid hold of a person under circumstances to which no rule of law had been previously declared to apply, and compelled him to appear as defendant in a suit, yet the Chancellor also never delivers a legal opinion except for the purpose of explaining the decree which he issues for adjusting the rights of the parties to a concrete dispute. So far, therefore, the Roman and the English officials moved on similar lines. Both were concerned with remedies; both acted through their control of procedure.

V. The System of Praetorian Edicts as compared with English Case Law.

Now, however, we arrive at a material difference between the Roman and the English Magistrates. The English judge never goes beyond the concrete case which is before him. If he declares the law, he declares it by deciding on the particular question which

has arisen between two individuals. He may incidentally, if so minded, deliver a lecture on the law bearing on the subject, and may pass in review all the cases cited in argument. Still, his judgement is not intended to go beyond what is absolutely necessary for the settlement of that question, and his view of the law is not authoritative so far as it strays into cognate but distinct topics. It is only the *ratio decidendi* that can be quoted as an authority. No *dictum* thrown out incidentally is of binding force; and those who in the future have to deal with his decision are often able to narrow down the *ratio decidendi* to a very fine point, and show that it turned so much on the special facts of the case as to be of little importance as a precedent. But the Praetor speaks generally. In the Edict which he issues at the beginning of his term of office he lays down a rule, intended from the first to be applicable to a large class of cases; or, to speak more exactly, he makes a promise and announces an intention of dealing with a large class of instances. If the class were not a large one, he would not think it worth while to announce such an intention. He is thus led to take much more bold and conspicuous steps, and he may effect at one stroke a larger reform than any single decision of an English Court can ever cause. He is far more distinctly aware of the fact that he is, though not formally legislating, yet taking action which may have the effect of changing the substance of the law.

In other respects also, the fact that the Praetor's changes are formally enounced in his Edict potently and beneficially influenced his reforming action. He was obliged to generalize and summarize. Where he

had to set aside an ancient rule which had begun to be mischievous and deserved to be obsolete, instead of merely nibbling away at the edges of it as our English judges were apt to do, he dealt with it in a broad and intelligible way, either superseding it altogether or laying down certain marked exceptions in which he declined to follow it. When he was establishing a new rule he had to consider how wide a field he desired to cover, what sets of instances were to be provided for, what was the common principle underlying those instances, how that principle must be expressed so as fairly to include them without including others which he had no wish to touch. The chief merit of a rule of law is that it should seize a feature which a large set of instances really have in common, and should effectually provide for them and for them only. The Praetor was moreover at the same time driven to be terse in the formulation of his promises, because the Edict was by tradition a comparatively short document, observing that stern brevity which the famous example of the Twelve Tables had made familiar and excellent in Roman eyes. Thus the results of his reforming action, the advance made at each step in the development of the law, were always presented in a clear, a comprehensive, and above all a concise form, so that the profession perceived exactly what had been done, were able to take the Edict as a subject for commentary and elucidation, and as a starting-point for further improvements. It was thus that the jurists treated it, seconding while also controlling by their opinion the action of the chief magistrate. He draws with a bold yet careful hand the outlines of the picture. They fill in the details, and so

work round and over each of his summary statements as to bring out more fully all that it contained and involved, to trace his principles into their consequences and to illustrate their application. The action of the jurists was as essential to him as he was to them, for while their advice often prompted him, and while their elucidations and teachings developed the meaning and contents of what he laid down, their criticism reprobated any hasty or inconsequent steps into which zeal or self-confidence might betray him. Nor did such criticism remain fruitless. For it will be remembered as another feature of the Roman edict-issuing system, and indeed one of its most singular features, that each Edict was issued by each magistrate for his one year of office only, and had no validity thereafter. This was so because he was not conceived to act as legislator, but only as an administrator whose commands, though they are not law in the strict sense, must be obeyed while his power lasts. At the end of the year they cease with that power, but his incoming successor may of course repeat them and give them another year of life, and so on from year to year and from generation to generation.

Thus the Edict, so far as it can be called legislation, is tentative legislation. It is an experiment continually repeated; an experiment whose failure is a slight evil, but its success a permanent gain. Suppose the Praetor Sempronius to have introduced a new sentence into his Edict, promising to give an action in a particular set of cases. The profession doubt the merit of the sentence, canvass it, observe how it works, and before the end of the year come to one of three conclusions.

They may approve it, in which case it will doubtless be repeated in next year's Edict. They may think it fundamentally wrong. Or thirdly, they may hold that though its object was good, that object has been sought in a wrong way. See then what happens if it has been disapproved. Next year a new Praetor—Cornelius—comes into office. In issuing his Edict he either omits altogether the obnoxious addition which Sempronius had made, or he so modifies it as to meet the objection which the jurists have taken. There is here none of the trouble, difficulty, and delay which arise when a statute has to be passed repealing another statute. There are not even those difficulties which occur under our English system when a case wrongly decided has to be overruled.

Observe how that English system works. A decision is given, perhaps hastily, or by a weak Court, which in a little while, especially after other similar cases have arisen, is felt by the bar and the bench to be unsound. There is a general wish to get rid of it, but it is hard to do so. People have begun to act on the strength of it; it has found its way into the text-books; inferior or possibly even co-ordinate courts have followed it; conveyances or agreements have been drawn on the assumption that it is good law. The longer it stands the greater its weight becomes, yet the plainer may its unsoundness be. Cautious practitioners fear to rely on it, because they think it may some day be overruled, yet as they cannot tell when or whether that will happen, they dare not disregard it. Thus the law becomes uncertain, and not only uncertain, but also needlessly complex and involved, for later judges, feeling the unsoundness

of the principle which this mischievous case has established, endeavour to narrow it down as far as possible, and surround it by a set of limitations and exceptions which confuse the subject and perplex the student. The matter may have one of three ultimate issues. Either lapse of time and the unwilling acquiescence of subsequent judges put its authority beyond dispute, as Mr. J. W. Smith says of a famous old instance, 'The profession have always wondered at Dumpor's case, but it is now too firmly settled to be questioned in a Court.' Or else, after a while, the point is carried to a Court of higher rank which has the courage to overrule the erroneous decision, and resettle the law on a better basis. Or possibly—though this but rarely occurs—a statute is passed declaring the law in an opposite sense to that of the unlucky decision. But it may be long before the second solution is found, partly because judges are chary of disturbing what they find, holding that it is better that the law should be certain than that it should be rational, and fearing to pull up some of the wheat of good cases with the tares of a bad case, partly because it may be a good while before a litigant appears willing to incur the expense of carrying the point to the higher and more costly tribunal. The third solution can be even less relied upon, for the legislature is busy and cares very little about the theoretical perfection of the law.

Even when the bad decision has been got rid of, a certain measure of harm is found to have been done. The authority of other cognate decisions may be impaired; transactions entered into, or titles accepted, on the faith of the case are shaken. One way or the

other the law is injured. But on the Roman system these evils were, not indeed wholly, yet to a much greater extent avoided[1]. Not only is the error of one Praetor easily corrected by his successor, but the occasion recurs year by year on which it must be either corrected or reaffirmed, so that a blemish is much less likely to be suffered to remain. If five or six successive Praetors have each of them in their Edicts repeated the provision introduced by one of their predecessors, men may confidently assume that it will be supported and perpetuated by those who come after, either in its original form or possibly in a more general form which will include its substance. There is no doubt some little temporary uncertainty during the first year or two, before the opinion of the profession has been unequivocally expressed. Such uncertainty can hardly be avoided in any system. But the fact that the Edict is annual gives ample notice that the provision is temporary and experimental, though, of course, fully valid during the particular year for which the Edict is issued. Thus the risk of mischief is reduced to a minimum.

Our data are too scanty to permit us to trace either the first beginnings of the Praetor's action, or the details of its working, or the changes which must unquestionably have passed upon it during the three centuries and a half when its importance stood highest, say from the end of the First Punic War to the time of the Emperor Hadrian (B.C. 241 to 117 A.D.).

[1] A particular case decided in a particular way under a provision of the Edict which was omitted next year would of course not be disturbed, for the Romans held firmly to the principle *stare iudicatis*.

Even of the Edict itself, in its latest and most complete form, we have only fragments, and do not know by what stages it was brought to the perfection which led to its being finally settled in a form never thenceforward altered. This took place under Hadrian, when Salvius Julianus, a famous jurist who was Praetor at the time, gave it the shape in which it became permanent, an *Edictum Perpetuum* in a new sense; it was then enacted by a *Senatus Consultum*, and in the form so enacted it was thereafter quoted and applied. Apparently, however, the effect of its enactment was not to make it a part of the general statutory law, but only to determine the form in which it was thereafter put forth by the magistrates. After that time such Edicts as were issued were special, containing declarations of the imperial will, usually addressed to particular circumstances. They were no longer Edicts in the old sense, but mere imperial constitutions.

It need hardly be said that under the Empire the action of the Praetor, like that of all other magistrates, had been liable to be directed or supervised by the Sovereign or his legal advisers. An interesting illustration of that supervision is worth mentioning, because it also brings into relief the fact that other magistrates, as well as the Praetor and Aediles, enjoyed the power of creating law by their action, which may be called either administrative or judicial, seeing that it united the two characters. Before the time of Augustus there had been no such thing among the Romans as the giving of an inheritance, or a legacy, by means of a Trust, *i.e.* by imposing on the honour and good faith of the person to whom property was left a legal obligation to

hand it, or a part of it, over to some one else as the real beneficiary. The practice of asking such a person to carry out the testator's wish had existed, but he could disregard the wish if he pleased. Augustus, however, on two occasions directed the Consuls (not the Praetor) to enforce such a request by their authority, thereby turning the moral into a legal obligation; and at the same time recognized an informal letter or writing (*codicilli*) as sufficient, where confirmed by a will, to impose a binding obligation on the heir. We are told that, in the latter case, having himself on one occasion performed what a testator had asked him, by way of trust, to do, he summoned a meeting of eminent jurists to advise him, and accepted the advice of Trebatius that the obligation should be held valid. These instances became the foundation of the extremely important changes which made the validity of Trusts, and that of *codicilli*, thenceforward a well-established legal doctrine[1]. As the origin of Roman trust inheritances is due to the action of the magistrates, so English trusts owe their legal force to the Chancellor; and through the operation of the practice of creating them, coupled with the Statute of Uses (27 Henry VIII, c. 10), there grew up the modern system of conveyancing.

The merits of our English Case Law system are very great. It is an abiding honour to our lawyers and judges to have worked it out with a completeness and success unknown to any other country. They have

[1] 'Primus divus Augustus semel iterumque gratia personarum motus, vel quia per ipsius salutem rogatus quis diceretur aut ob insignem quorundam perfidiam, iussit consulibus auctoritatem suam interponere. quod quia iustum videbatur et populare erat, paulatim conversum est in adsiduam iurisdictionem' (*Inst.* ii. 23. 1). See also *Inst.* ii. 25.

accumulated in the Reports an unequalled treasure of instances, conjunctions of circumstances raising points of law far more numerous than the most active intellects could have imagined. These points have been argued with the keenness which personal interest supplies, and decided under that sense of responsibility which the Judge feels when he knows not only that his judgement is to determine the pecuniary claims or social position of suitors, but also that it is to constitute a rule which will be canvassed by the bench and the bar, and find its place in volumes that will be studied long after he has quitted this mortal scene. There is therefore a practicality about English Case Law, a firm grasp of facts and reality, as well as a richness and variety, which cannot be looked for in legal treatises composed even by the ablest and most conscientious private persons, who, writing in their studies, have not been enlightened by forensic discussion nor felt themselves surrounded by the halo of official dignity. If the treatises of the great Roman jurists do to a large extent possess these same merits, it is because they too were, in a measure, public officers, and because much of the law they contain arose out of concrete cases[1].

The characteristic defects of Case Law which must be set against these merits are two. There is, first of all, its frequent uncertainty. As has been remarked already, one must always assume a certain percentage of ill-decided cases which it is hard to get rid of. And it may often happen that a particular point, which specially needs to be determined in the interests of legal science,

[1] Not that all the cases we find in the *Digest* are concrete cases, for a good many seem to have been imagined for the sake of illustrating the applications of a principle. Cf. the illustrations in Macaulay's Indian Penal Code.

remains for years, or even centuries, unsettled, because it is never brought before the Courts in a neat form which raises just the issue that wants settling. Sometimes it hardly matters which way the decision goes: the important thing is to have a decision, yet there is no means provided of getting one, unless by invoking the legislature, which is usually too much occupied with political controversies or administrative problems to care for settling such a point. And secondly there is the utterly unsystematic character from which Case Law necessarily suffers, and which it necessarily imparts to the whole law of the country. This defect is too familiar from everyday experience to need any illustration. It is the capital defect, one might say almost the only defect, of the law of England; and people have so long talked in vain about remedying it by means of a Code, that they have at last grown tired of the subject, and seem to be settling down into despair. I refer to it for the sake of pointing out how the institution of the Roman Praetor met a similar danger. The Romans had, to be sure, no great turn for scientific arrangement — their efforts at codification and the structure of their legal treatises show that—but the Praetor's Edict had the immense advantage of presenting all the gist and pith of the newer law in a compact form, clearly and concisely set forth. The Edict thus became a centre round which the jurists could work, a point of departure for all further legislation, a main line of road running through the network of lanes, courts, and alleys that had been built up by a multitude of statutes and treatises. It was capable of being constantly amended and extended so as to take in all changes in the law, while

yet retaining its own character; and it gave a unity, a cohesion, a philosophical self-consistency to the Roman law which it must otherwise have wanted even more than does our own. A German writer has somewhere remarked, in commenting on the crude and fragmentary character of the Roman Criminal Law, with whose development the Praetor had comparatively little to do, that the faults of that branch of legal science show how absurd it is to ascribe the merits of Roman jurisprudence to any special gift for legislation bestowed by Heaven on the Roman people. The excellence of their private civil law is (he observes) due simply to the fact that they had the good sense, or perhaps the good luck, to have provided in the Praetorship an office specially charged with the duty of constantly amending the law so as to bring it in accord with the growing civilization and enlarging ideas of the people. There is much truth in this. The Romans, however, did not invent their Praetor with any such conscious purpose. Their merit was that, when they saw him occupied in developing the law, they gave him free scope, and supported him in his beneficent work. He is a unique figure among the law-making organs of the nations. Since he is the choice of the people, he is able to do things which the minister of an absolute monarch might prudently shrink from doing; and the people permit him to retain his functions, even in days when the habit of directly legislating had so much increased that it might have been supposed that legislation would restrict or supersede his action. No modern republic would vest such power in an official, nor would any modern monarch be permitted by public opinion so to vest it.

Nevertheless, though he belongs to a world which cannot return, the Praetor's career may suggest to us that every civilized nation ought, in some way or other, to provide an organ representing its legal intelligence which shall mould and supervise the gradual and symmetrical development of its law. It may be suggested that all modern States do provide such an organ in their legislatures, whose business is largely, in some instances almost entirely, that of making law, and which presumably contain the most capable men whom the nation possesses. When we have considered the conditions under which legislatures work, as I propose now to do, we shall be better able to judge how far they fulfil the function which the Praetor discharged at Rome.

VI. Direct Legislation at Rome.

A. *The Popular Assembly.*

We have now compared the organs and the methods of legislation which existed in the Roman Republic and Empire with those of England, so far as relates to the action of the jurists, magistrates, and judges. Taking first the Roman jurisconsults and authors of legal treatises, it was suggested that their English analogues were rather to be found not so much in text-writers as in the judges, the result of whose labours is preserved in the vast storehouse of the Reports; while in considering the action of the Roman Magistrates, especially of the Praetor, in the creation of law, stress was laid on the advantages which the peculiar position of this great head of the whole judicial system presented for the gradual and harmonious

development of legal rules, an advantage which the disconnexion of the Chancellor from the Common Law Courts did not permit in England. This led to an examination of the English method of developing and amending of the law by the decisions of the Courts, a method which, if it loses something in point of symmetry, has the advantage of providing an unrivalled abundance of materials for the determination of every question that can arise, and of subjecting each disputable point to the test of close and acute scrutiny.

We may now go on to examine another mode of creating law, that namely which proceeds immediately from the supreme power in the State, and which may, as contrasted with the indirect creation of law by jurists, or magistrates, be called Direct Legislation.

The organ of such direct legislation is the supreme authority in the State, whether such authority be a Person or a Body, whether such body be the council of an oligarchy or a popular assembly, and whether such popular assembly be primary or representative.

The method whereby Direct Legislation is enacted is the public proclamation (usually, and now invariably, but of course not necessarily) in writing by the Supreme Authority, of its will as intended to bind the citizens and guide their action. And the result is what we call Statute Law as opposed to Common Law. The distinction is a familiar one to both nations. The later Romans contrast *Ius* and *Lex*[1]: we contrast Common Law and Statute.

[1] By the time of Justinian the distinction had come to be between *Ius* as the old Law, including republican statutes, Senatus consulta, the Edicts

Let us first inquire what were, at different periods in the long annals of the Roman State, its various organs of direct legislation, and how each of them worked. It is of course only in outline that so large a subject can be treated.

The Roman State lasted 2,206 years—from the unauthenticated 'founding of the city' (for which I assume the traditional date of B.C. 753) down to the well authenticated capture of Constantinople by the Turks in A.D. 1453. Some would carry it down to 1806, and thus give it a life of 2,559 years, but the feudal Romano-Germanic Empire is such a totally different thing in substance from the Empire at Rome or at Constantinople, that although its sovereigns often claimed to legislate after the manner of Constantine and Justinian, nothing would be gained by bringing it and them within the scope of our inquiry. Now during this long period of two and twenty centuries, from Romulus to Constantine the Sixteenth, three such organs were successively developed. The first was the popular assembly of the citizens; the second, the administrative council of magnates and ex-officials; the third, the autocratic monarch. The first co-existed for a certain time with the second, the second with the third. The rights of the first and the second seem to have never been formally extinguished, even when the third had become in practice the sole source of law. Still we may, with substantial accuracy, limit the action of the first to the republican period, that of

of magistrates and the writings of the jurists, and the new Law, which consisted of imperial ordinances, and was called sometimes *Ius Novum*, sometimes *Leges*.

the second (so far as properly legislative) to the earlier two centuries of the imperial monarchy, while in later ages the third alone need be regarded.

As I am not drawing a historical sketch, but merely attempting to point out how each organ acted in producing law, I shall not stop to discuss any constitutional questions as to the rights or powers at various times of these organs respectively, but shall assume each to have been in its own day duly recognized as competent to legislate. That is the view presented to us by Gaius (writing in the second century A. D.) and in the *Digest* and *Institutes* of Justinian enacted in the sixth century A. D. The Emperor says, 'The written law consists of statutes, resolutions of the *plebs*, decrees of the Senate, the ordinances of emperors, the edicts of magistrates, the answers of jurisconsults[1].' We have already considered the two latter, and have now the four former kinds of legislation to examine, all of which may be called, in a wide sense of the term, Statutes, *i. e.* declarations of the will of the State formally promulgated as law.

The legislative power of the Roman people was exercised, during the Republic, through three assemblies, those of the curies (this soon lost all practical importance), the centuries, and the tribes. Passing by the interesting and difficult questions as to the composition of these bodies, their respective functions, and the time when each may be said to have acquired or lost its

[1] 'Scriptum ius est lex, plebiscita, senatus consulta, principum placita, magistratuum edicta, responsa prudentium. Lex est quod populus Romanus senatore magistratu interrogante, veluti consule, constituebat: plebiscitum est quod plebs plebeio magistratu interrogante, veluti tribuno, constituebat' (*Inst.* i. 2. 3, 4).

authority, we may remark several features which they had in common, and which impressed a peculiar character on the laws that emanated from them. The differences between them do not affect the points to which I am going to call attention. All these *comitia* (literally, meetings) are Primary assemblies, that is to say, they are not representative bodies, but consist of the whole body of citizens, just like a Homeric ἀγορά, an Athenian or Syracusan ἐκκλησία, a Frankish *mallum*, an Old English Gemot, an English seventeenth-century Vestry, a New England Town Meeting, an English Parish Meeting under the Local Government Act of 1894, an Icelandic Thing, a Basuto Pitso. The Roman assemblies are, therefore, large bodies consisting of thousands, often many thousands, of persons, and fluctuating bodies, in which not always the same persons will be present, and in which those who live near the place of meeting will tend to preponderate. Further, they are—and this is a remarkable feature of the Roman system—bodies composed of minor bodies, and determining their decision by a system of double voting. Each individual votes in the group to which he belongs, *curia*, *centuria*, or *tribus*, as the case may be; and it is by the majority of curies, centuries, or tribes that the decision of the assembly as a whole is given, the collective voice of each of these groups being reckoned as one vote, and a small group having as much weight as a large one. Thus there may be a majority of group votes for a proposition while the majority of votes of individuals is against it. This mode of voting, unfamiliar to modern political constitutions, survives in the Rectorial elections of two

(Glasgow and Aberdeen) of the four Scottish Universities, where the students vote by 'nations'; and it has sometimes happened that a person is on this method chosen to be Lord Rector against whom a majority of the votes given by the individual electors has been recorded[1]. So under the Constitution of the United States, when no candidate for President has received a majority of the votes given, the House of Representatives chooses one of the five candidates who has received most votes, and in doing so the House votes by States, *i.e.* the majority of the Representatives from each State determine the vote of that State, and the majority of States (not of individual Representatives) prevails. Thirdly, these assemblies can be convoked and presided over only by a Magistrate, and their action may be stopped by another Magistrate. Fourthly, no discussion takes place in them. They meet only to vote on propositions submitted by the presiding Magistrate, who alone speaks, and who speaks only to put the question. Fifthly, they vote once only, and that vote is final and supreme, requiring no assent of or confirmation by any other body, but operating directly to create a rule binding all members or subjects of the State.

Such a machinery seems almost as if calculated either to check legislation by throwing obstacles in its way, or else to make legislation hasty and imprudent. The passing of a long measure or a complex measure might be thought scarcely possible under it; while at the same time it secures no opportunities for criticism and revision, and for the reconsideration at a future

[1] See 52 & 53 Vict. c. 55, § 14, subs. 4.

stage of decisions too hastily taken when the measure was first submitted. Thus there would appear to be a double danger involved in such a system, the danger of not moving at all, and the danger, when the people do move, of going too fast and too far. It must be remembered, however, that not very much direct legislation was needed. The improvement of ordinary private law was for the most part left to the Praetor and the jurists, while one great branch of modern legislation lay almost untouched during the Roman Republic, that of the regulation of powers and functions of administrative departments. There was comparatively little general administrative law in our modern sense in Italy, because in Rome the magistrates and Senate had a pretty wide discretion, and through the rest of Italy the local communities managed their own affairs. So too in the provinces administration was left either to the local municipalities or to the Roman governors, proconsuls, or propraetors.

Even if the method of legislating which these assemblies followed be deemed ill fitted to secure that the merits of any change in the substance of the law should be carefully weighed, it need not have been equally deficient in making it excellent in point of form, *i.e.* clear, consistent, symmetrical. In this respect the absence of means for discussion and amendment may have worked for good. Statutes enacted in the form in which they have been originally proposed are more likely to be plain and simple than those which have been cut about, pared down, and added to by the action of some revising Committee or of a Second Chamber, probably dissimilar in opinion

from the First Chamber, possibly disposed to differ for the sake of differing. The volume of direct legislation may, under a system like that of Rome, be comparatively small. But the fewer changes in the law are made by statute so much the better for the harmonious development and inner consistency of the whole body of law, which suffers far less often from permitting the survival of an occasional anomaly or absurdity than from frequent tinkering, that is to say, from the introduction of exceptions to general rules, or the multiplying of provisions for special cases. So far, therefore, as quantity is concerned, the small amount of legislative work which the Roman *comitia* turned out was a matter for satisfaction, not for regret.

As respects the quality of that work, the character of the Assembly produced some remarkable consequences. That it might be understood and approved by the ordinary citizens, the bill proposed must be comparatively short, terse, clear. In many cases it would have been previously discussed at public meetings, which the magistrate could summon; but those who would attend the meetings might be but a small proportion of those called upon to vote in the *comitia*. As it could not be amended by the Assembly, and would reflect credit or discredit on the name of the proposing Magistrate who was responsible for it, it must be prepared with scrupulous care. As it would become operative immediately on its being approved by the single vote of the Assembly, with no opportunity of correcting it at any later stage or in any other legislative body, an error would be serious to the community, and specially

damaging to the proposer. Moreover, as it could not be amended in the Assembly, it escaped all risk of having its drafting spoiled and of losing what original merits of breadth, lucidity, logical arrangement, and conciseness of expression it might possess. No one could move to add or to omit a clause. No large principle could be qualified by the insertion of limiting words. No savings for particular cases could be suggested, and possibly accepted in order to buy off opposition. 'Yes' or 'No' to the whole bill—these were the only alternatives. And the simpler the bill, so much more probable the 'Yes'; whereas in assemblies with power to amend, a 'Yes' has to be purchased by compromises and concessions, which, whatever effect they may have on the substance of a measure, destroy the elegance of its form. The statutes passed by the Roman people had, therefore, owing to these causes, three great merits. There were few of them. They were brief. They were clear. We possess fragments, in some cases pretty large fragments, of a good many; and in all the drafting is excellent. The sharp, stern, almost grim conciseness and precision of the Twelve Tables seem to have been always present to the mind of the Roman draftsman as the model he ought to follow.

It is worth remarking that the earliest Roman conception of a *Lex* or Statute was different from that which we find in the imperial period, as well as from that which any modern jurist would naturally form. The word *lex* meant in early Latin simply a set form of words; and when applied to an enactment by the *comitia*, it described, not a special kind of legal rule, but merely the expression of the

people's will in set terms. And the original conception of a statutory enactment was that of a contract made between the Citizens in the *comitia* and the Magistrate representing the Corporate State. Hence the definition of *Lex* which we find given by Papinian (*Dig*. i. 3. 1), 'the common covenant of the republic' (*communis reipublicae sponsio*), probably descends from the old practice according to which the Consul or other presiding Magistrate asked (*rogavit*) the *comitia* whether such and such was their wish, submitting to them the form of words whereby they were to agree to bind themselves. Just as in the Roman *stipulatio* the questioner asks the promiser whether he promises to do such and such a thing, to which the latter answers, 'I promise' (*spondeo*); so the Consul asks the Quirites whether they wish and order that such and such a thing shall be done (*Velitis, iubeatis, Quirites?*), whereto the citizens answer, 'Be it as you ask' (*Uti rogas*). Thus the first (or at any rate a very early) form in which the notion of a formally enacted, as distinct from that of a Customary, Law emerges in Rome is that of a Contract.

The Romans were like the English in this, that they seldom did anything formally till it had for a great while been done practically. Long after the power of legislation had passed in substance from the king of England to his subjects represented in his Great Council, the forms of the Constitution continued to suggest that the monarch was still the prime agent in legislation. To-day the so-called Royal Veto, which ought rather to be called the right of the Crown to take further time to consider the resolutions of the two Houses, subsists in theory unimpaired, though it has

not been exercised since 1707. So when actual power passed from the *comitia* to the Imperator in the days after Julius Caesar and Augustus, the rights and functions of the Assembly were not formally extinguished. Magistrates continued to be elected by the *comitia* till the accession of Tiberius, and the right of legislation remained for a great while afterwards legally vested in them. Statutes appear to have been passed by them as late as the time of Nerva. The *comitia* themselves died out by obsolescence, without being ever formally abolished, and apparently they went on meeting occasionally in a purely formal way long after they had ceased to be a reality, just as the name *Respublica Romana* survived in documents and inscriptions when the old associations it evoked had been forgotten[1]. And the popular assemblies died out all the more quietly because they had never met of themselves, by simple operation of law. Like the English Parliament, but unlike the American Congress and the Chambers of some European countries, they needed to be convoked by the Executive[2].

VII. Direct Legislation at Rome.

B. *The Senate.*

When legislation by these assemblies ceased the turn of the Senate came. This body, a Council of Elders as old as Rome itself, perhaps in its original form corre-

[1] I saw a few years ago, in the ruins of Salona in Dalmatia, a lately uncovered inscription, dating apparently from the sixth or seventh century A.D., in which the protection of God is asked for the 'respublica Romana.' It need hardly be said that the term has in strictness nothing to do with the form of government, no more than has our English term 'Commonwealth.'

[2] The Crown is now in England bound by statute to summon Parliament, but should the Crown omit to do so, Parliament could not legally meet

sponding to the Council which surrounded the Homeric king, seems to have claimed, even during the Republic, the right of general legislation, a right which the popular party denied, and which was probably not well founded in law, although its undoubted competence to issue administrative decrees for temporary purposes made the claim plausible, and raised many questions of delicacy and difficulty regarding the exact limits of its power. Moreover the Senate, whose proper function was to advise the magistrates, came to have a sort of ill-defined authority over them, and they often found it prudent to shelter themselves under that authority; so sometimes a resolution directing a magistrate to take such and such a course might be quoted as possessing legal validity, especially if the course was one which lay within the scope of his official discretion. The whole subject was full of uncertainty, and a controversy seems to have gone on among constitutional lawyers regarding the Senate's powers, similar to that which long raged in England over the so-called dispensing power of the Crown[1]. When the *comitia* ceased to be convoked, except occasionally as a matter of form to give effect to the monarch's will, it was natural that the legislative functions of the Senate should win full recognition, for they furnished exactly the method of legislation which the Emperors desired. As the Roman State remained a republican common-

of itself, save that upon the demise of the Crown it does forthwith come together to swear allegiance to the new Sovereign.

[1] This is illustrated by the words of Gaius, 'Senatus consultum legis vicem obtinet quamvis fuerit quaesitum' (Gai *Inst.* i. 4). Ulpian however says, 'Non ambigitur senatum ius facere posse' (*Dig.* i. 3. 9). It too exerted a sort of dispensing power: cf. Sallust, *Cat.* 29.

wealth in theory and in strict intendment of law long after it had passed under the sway of a monarch, and as it was the object of the monarch to keep up this theory, he found it easy and safe to act through the Senate, which (though absolutely obedient to him) still wore the air of an independent body, rather than in his own person, ample as was the magisterial authority wherewith he was clothed. Thus the Senate at the same moment acquired power and lost it. It became recognized as entitled to make law, but it found itself the mere instrument of the Emperor for that purpose. From the time of Tiberius down to that of Hadrian, many laws were passed by the Senate; and though its action became thenceforward less frequent and less important, its rights lasted as long as it lasted itself, that is to say, till it died out in the disorder of the seventh century. They are referred to by Justinian as if still existing, but we do not hear of any practical use made of them in his time. One of the latest measures ascribed to the Senate is, oddly enough, a decree for regulating the election of Popes, and preventing tumults thereat.

The Senate was in most respects much better fitted for legislative work than the popular assemblies had been, indeed than most assemblies have been in any country. It was composed of men of mature age, versed in affairs, many of them having filled high office, others having served as judicial referees, if we may so render the term *iudices*; all therefore, or nearly all, possessing some knowledge, and many a large knowledge, of law and of administration. It was large enough to comprise persons of very varied experience, while small enough

(in normal times) to be business-like, and to avoid the danger of degenerating into a mob[1]. Like the *comitia*, it voted only once on a proposition, and that one vote was sufficient to pass a law. Again like the *comitia*, it could only deal with what the magistrate brought before it, private members having no initiative. But, unlike the *comitia*, it could debate a proposition and make amendments thereto; that is to say, when a particular draft measure was submitted, it was able, being thereby seized of the matter, to reject the proposition as drafted, and to pass one containing different provisions. There does not seem to have been anything analogous to our English system of going into Committee, and afterwards making a report to the House; but, as the decrees submitted were short and simple compared to those which the British legislature deals with, the method of amending the proposal submitted, or debating and passing an alternative proposal, was doubtless sufficient for the needs of the case. What was lacking to the Senate was not machinery, but force. It was a tool in the hands of the Emperor, and was used by him as a means of formally enacting and promulgating measures on which he had already decided. His influence soon came to be so fully recognized that the later lawyers sometimes cite not the *Senatus consultum* itself, but the speech (*oratio*) in which the Emperor proposed it to

[1] Though Augustus found over a thousand members in it, many of them unworthy, and was obliged to purge it carefully down to a reasonable strength (Sueton. *Octav.* 35). Whether there were senators with no legal right to speak but only to vote—they voted, as in the English Parliament, by dividing into two bodies—is matter of controversy. There was no closure, so senators used to talk against time.

the Senate, although in these cases the legal validity of the law seems to be attributed to the vote of the Senate. After Hadrian it would appear that legislative decrees were always passed at the instance of the monarch.

Under an indulgent Emperor, and in matters of ordinary private law, there might of course be no great reason why amendments should not be suggested or even opposition made, by an active senator, to bills proposed by the presiding magistrate, although the magistrate himself was usually merely the mouthpiece of the monarch. But the habit of servility grew so fast, that even this remnant of independence seems to have soon become rare. Nothing was so dangerous as to give offence to a sovereign whose power was restrained only by his good nature.

The checks which have been noted as existing in the case of the *comitia* on prolixity or obscurity in the terms of a statute, were absent in the case of the Senate. Yet the good habits formed in earlier centuries were not lost. The *Senatus consulta* which remain to us are favourably distinguished by their clearness and brevity. The ease with which they could be passed, or repealed when passed, does not appear to have led to their being drawn carelessly as regards either substance or form. It may however be remarked that having been originally not so much laws as resolutions of a body primarily advisory, intended to express its opinion, and to guide or strengthen the hands of an executive magistrate, they continued to be couched in language hardly so technical as that of the old *leges*. They are less imperative in form, and often express quite as much in their preamble, which contains the motives

that have suggested the decree, as through the more strictly enacting part. Occasionally they approach dangerously near, as preambles are apt to do, to becoming rhetorical declarations of policy.

The *Senatus consulta* actually preserved, or known to us by name, are less numerous than might have been expected. The same may be said of the *leges*, or rather of such among them as were of general and permanent effect, not mere acts of an executive nature. If we could suppose that the legislative activity of the Roman State had manifested itself only through *leges* and *Senatus consulta*, it would be hard to understand how that State, developing as it did, could have got on and attained its amazing development in wealth and population with so few legislative changes. The explanation, of course, is that the Praetor and the jurists were doing the main part of the work, just as during the eighteenth century in England the judges and text-writers were steadily developing our private law, which was but little altered by statute through the whole of that century. During the later Republic and the earlier Empire direct legislation was (speaking generally) resorted to either to abolish some deeply rooted rule or else to establish some new departure, which a magistrate hesitated to undertake on his own responsibility.

VIII. Direct Legislation at Rome.

C. *The Emperor.*

The third and last form of direct Roman legislation is that of imperial ordinance. In one aspect it is the most important form, because nearly all the law of statutory

origin which has come down to us was enacted by the Emperors, the number of *leges* and *Senatus consulta* being slight in comparison. The Emperors, moreover, spoke the last word. It was their legislation which gave to the Roman law the shape in which it descended to the modern world both in the East and in the West.

The Emperor's legislative authority grew up slowly and almost imperceptibly out of the rights which he enjoyed as holder of several great magistracies, or invested with the powers which belonged to them. Although, in later times, the imperial function of legislation was ascribed to a formal transfer made to him by the people of their own authority[1], it is important to remember that its true parent is to be sought, not in *leges*, nor even in *Senatus consulta*, not in any representation by him, as the heir of the Assembly, of the ancient right of popular sovereignty, but rather in the Edicts of the magistrates, whether their formal enunciations on entering office of the rules by which they proposed to act, or their less public instructions to their subordinate officials.

Even the action of the jurists, and the custom of issuing answers on points of law (*responsa*), contributed something to the conception of the Emperor as a source of law, for he was, as a magistrate, an authoritative exponent of the contents of the customary law, and of the interpretation of the statute law; and if an answer given under his commission by an authorized jurist was binding on a *iudex*, how much more weight was due to a declaration proceeding from himself, the fountain-head of authority? That the imperial ordi-

[1] Cf. Just. *Inst.* i. 2. 6: cf. *Dig.* i. 4. 1.

nances have not preserved the outward forms and character of the republican statutes is a consequence of these facts and of the conception I have described. They are not expressed in the same strict and highly technical language as the old statutes were. As regards some of them, and especially some of those which belong to the first two centuries of the Empire, it is hard to say whether they were originally intended to have a general application, for they may have been mere instructions or declarations of opinion, given for the special occasion and purpose only. In fact the Emperors found it necessary to protest against the tendency to attach legal weight to all their words. Trajan, for instance, who seems to have left the character of being more indulgent than most of his predecessors or successors —witness the story of the widow through whom and the prayers of Pope Gregory he obtained salvation[1]— declares that when he makes an answer to a particular request he by no means desires to be taken as establishing a precedent. He felt, no doubt, that in many cases the precedent would be of questionable value, according to the proverb that hard cases make bad law. However, the tendency was too strong to be resisted. All declarations emanating from the supreme authority in the State were taken to be binding on its subjects: and we may imagine how often a wily advocate, or an adulatory judge, would, with loud professions of loyalty, insist on regarding as law what the Emperor had intended to be merely a good-natured compliance with the petition of some unlucky or importunate suppliant.

It is not necessary for our immediate purpose to

[1] Dante, *Purgat.* canto x.

describe the various forms which the legislation of the Emperors took. They are classed as Rescripts, answers to questions or petitions, Edicts or general proclamations, Mandates or instructions to officials, Decrees (*decreta*), decisions of the Emperor as being at first practically, and at last legally also, a Supreme Court of Appeal[1]. In later times the general name of Constitutions (*constitutio est quod imperator constituit*), was given to them; and in what has to be said further, minor differences between the above mentioned forms may be ignored, and the various kinds of constitutions may be treated together as being all of them enunciations by the sovereign power of those general rules of law which it desired to have observed by its subjects—as being in fact on the same footing as an imperial Ukase in Russia, or an Act of Parliament in England.

Such legislation by an irresponsible autocrat as that with which the Roman State ended, stands at the opposite pole from that legislation by a primary assembly with which the Roman State began. The latter organ was a stiff, heavy, cumbrous machine, which it was hard to set in motion, and which could work only under certain prescribed forms. The former was not only immensely powerful, but so readily applicable, playing so swiftly and so smoothly, that it was likely to be used too often and to act too fast. The Roman Emperor occupied, it must be remembered, a position different from that of any absolute sovereign in modern times. The Czars in Russia now, the

[1] Sometimes the speeches delivered to the Senate are included, but in these cases the law seems (as already observed) to have been deemed rather senatorial than imperial.

Prussian and French kings in the last century, are, or were, the heads of their respective nations, and therefore not only to some extent likely to participate in national ideas and sentiments, but also largely amenable to national public opinion. However complete their legal sovereignty and practical control, the misuse of their legislative powers could not escape popular censure. A national king is naturally restrained by the fear of displeasing his fellow countrymen. But the monarch of the Roman world, a world where the old Roman nationality had, before it expired, so far crushed the other subject nationalities that none of them could offer any resistance to the levelling pressure of the imperial authority, found himself unguided and uncontrolled by any influence, except the dread of a palace conspiracy or a military rising. Public opinion possessed then no voice, such as it afterwards found in the church, or finds now in the press. The various peoples who, from the second or third century A. D. onwards, called themselves Romans, had not been sufficiently fused together to have a common public opinion. It was not till the sixth or seventh or eighth century that the greatly narrowed Eastern Empire began to have a social and moral coherence, and developed into what might be called a National power.

This unique position of the Roman Emperor made legislation a great deal easier for him than for any modern monarch, easier than for the ruler of China, because there was no vast body of ancient customs he might fear to break through, easier than for a Turkish Sultan, because there was no quasi-ecclesi-

astical authority like the Sheik-ul-Islam or the whole body of Muslim doctors he might fear to offend. And the fact already noted that the powers of the popular Assembly had not been formally vested in him, worked in the same direction. Had there been any legal transference of legislative functions, some of the old forms and methods would have passed over with the transfer. There would have been at any rate a pretty sharp line drawn between the officially promulgated ordinances of the Emperor and the merely occasional and informal expressions of his will. But (as has already been noted) the Emperor did not legislate as the assignee of the popular power of legislation. His function of making laws sprang from his authority as a magistrate, and the undefined character of that authority remained with him, and helped to make his exercise of it infinitely various in shape and expression. Accordingly in later days no line was formally and technically drawn between the more and the less solemn declarations of his sovereign will. He was not bound by the laws. He made law as a part of his daily administrative and juridical action. He legislated, one might almost say, as he talked and wrote. He exhaled law. Whenever an idea occurred to him, or to the minister authorized to speak in his name, he had only to sign, in the purple ink reserved (in those later days) for the monarch, a few lines, and therewith a law sprang at once into being.

This was the theory, and this was also to some extent the practice. Still the exigencies of a position which threw on one man a prodigious burden of toil and responsibility, compelled the Emperors to

make regular provision for the discharge of their legislative and judicial work. A Council soon grew up, consisting at first chiefly of Senators, afterwards largely of jurists, whose members acted as assessors to the Emperor when he heard civil or criminal cases, and who also advised him on projects of legal change. At first it was a fluctuating body, composed of persons whom the monarch summoned for each particular occasion, though doubtless some of the ablest and most trusted men would be invariably summoned. But under Trajan and Hadrian it became a regularly organized chamber of formally nominated and salaried officials, in which, besides jurists, there sat some Senators and Knights, and a few of the chief court officers, together with the Praetorian Prefect, who seems after the second century to have held the leading place. As it was numerous, we may suppose that particular members were summoned for particular kinds of business, or that it often worked by committees. In all these points it furnishes an interesting parallel to the English Privy Council. And it was itself, under the name of Consistorium, which it took in the time of Diocletian, the model on which the papal Consistory was ultimately built up by the bishop of the imperial city. Some of its chief members were the immediate ministers of the sovereign, journeying with him, as Papinian accompanied Septimius Severus to York, or directing legal and judicial business from Rome, while he made progresses through the provinces, or warred against the barbarians on the frontier. Among the duties of the Emperor's legal councillors, that of prompting, directing, and shaping legislation must

have been an important one. Probably there was a regular staff for the purpose, a sort of Ministry of Justice, directed by the Praetorian Prefect, and in later times by the Quaestor, with a body of draftsmen and clerks. How much the Emperor himself contributed, or how far he examined for himself what was submitted to him, would depend on his own special knowledge and industry. Rude soldiers like Maximin, debauchees like Commodus, would leave everything to their advisers, and if these had been wisely selected by a preceding Emperor, things might go on almost as well as under a capable administrator like Hadrian, or a conscientious one like Severus Alexander[1]. The number of constitutions enacted was enormous, judging not only from what the Empire must have needed, but from the laws, or fragments of laws, which remain to us in the Codes of Theodosius II and Justinian; and as the legislative action, both of the Senate and of the Magistrates (other than the Emperor), had almost wholly ceased after Hadrian's time, while the local rules and customs of the provinces tended to be more and more superseded by the law of the ruling city, legislation may, at least for a considerable period, have rather increased than diminished in volume.

The good and bad points of a system which commits the making of laws to an absolute sovereign are easily summed up. Autocratic power is the most swift and efficient of all instruments for effecting reforms. Used with skill, tact, and moderation, it can confer incalculable

[1] Of whom we are told that he never sanctioned any Constitution without the advice of at least twenty jurisconsults. After Hadrian the *Consiliarius Augusti* had a position of recognized dignity.

benefits on a country. To be able at your pleasure to abolish obsolete institutions, to curtail the offensive privileges of a class, to override vested interests, to remove needless anomalies and antiquated forms of procedure, to simplify the law by condensing a confused mass of statutory provisions, or expressing the result of a long series of cases in a single enactment, and to do all this without the trouble of justifying your enlightened purposes to the dull and the ignorant, or of mitigating hostility by concessions and compromises which ruin the symmetry and reduce the effectiveness of your scheme—this is indeed a delightful prospect for the law reformer. The power of trying experiments is seductive to the philanthropist or the philosopher, for there are many problems which ought to be attacked by experimental methods, since nothing but an experiment can test the merit of a promising plan. Yet experiments are just the things which in popularly governed countries it is rarely possible to try, because the bulk of mankind, being unscientific, will seldom permit a thing to be tried till it has been proved to be not merely worth trying but absolutely necessary, while when it has been tried, and has not worked well, it is almost as hard to persuade them either to vary it or to drop it altogether. To tell the multitude that the scheme you propose may fail, though you think it worth trying, is to discredit it in their eyes. To admit that it has failed is to destroy your own credit for the future.

So again, if it is a question of improving the form and expression of the law, an absolute monarch evidently enjoys the finest possible opportunities of creating a perfect system. He can command all the highest

legal ability of the State. He can bestow upon his commission of legislators or codifiers the widest discretion. When they have finished their work he can subject it to any criticism he pleases before enacting it as law. When he enacts it, he can abolish all preexisting law by a stroke of the pen. Even afterwards he can readily correct any faults that may have been discovered, can suppress old editions, can provide means by which the law shall be regularly from time to time amended, so that all new statutes and all interpreting decisions shall be incorporated with it or appended as supplements to it. Few are the philanthropic enthusiasts, few are the theoretical codifiers, who have not sighed for an Autocrat to carry out their large designs.

According to that law of compensation which obtains in all human affairs these advantages are beset by corresponding dangers. Ease begets confidence, confidence degenerates into laxity and recklessness. As the laws of metre and rhyme help the versifier by forcing him to study and polish his diction, so he who is not now and then stopped by obstacles is apt to advance too quickly, and may not consider whither he is going. If an error can be readily recalled it is lightly ventured, and the hasty legislator discovers too late that it is not the same thing to recall an error as never to have committed it. In the field of legislation the danger of doing too much is a serious danger, not only because the chances of error are manifold[1], but because the law ought to undergo as few bold and sudden changes as possible.

[1] Τὸ μὲν γὰρ ἁμαρτάνειν πολλαχῶς ἐστι, τὸ δὲ κατορθοῦν μοναχῶς, says Aristotle: 'You can hit only in one way, but you may miss in many.'

The natural process whereby the new circumstances, new conditions, new commercial and social relations that are always springing up become recognized in custom and dealt with by juridical science before direct legislation impresses a definite form upon the rules that are to fix them—this process is the best, and indeed the only safe way by which a nation can create a refined and harmonious legal system. Even the certainty of the law is apt to suffer if legislation becomes too easy, for the impatient autocrat may well be tempted, when some defect has been discovered, to change it forthwith, and then to find that the change has been too sweeping, so that steps must be taken backward, with the result of rendering doubtful or invalid transactions which have occurred in the meantime. If these dangers are to be avoided, it must be by entrusting legislation to the hands of advisers not only learned and skilful but also of a conservative spirit. In war and politics boldness is quite as needful as caution, but in reforming the law of a country the risk of going too slow is less serious than that of going too fast.

These observations are illustrated by the course of events at Rome. At first, while the magistrates were still hard at work in building up the law by their Edicts, and the jurists no less active in developing it on conservative lines by their *responsa* and treatises, the Emperors used their legislative power sparingly because they were guided by accomplished lawyers. Comparatively few constitutions are cited from the days of Trajan and Hadrian, and even from those of the Antonines. These constitutions are short, clear, precise, introducing only those new rules or deciding only

those questions which it was necessary to establish or deal with. After the time of Diocletian[1], when the powers of the old magistrates had withered away and the fountain of juristic genius had dried up, direct legislation became far more copious, and began to range more widely over all sorts of subjects. Serviceable it certainly was in the way of abolition, for there was much to be abolished. But it tended to become always more and more rash and heedless in its dealings with the pre-existing law. Apart from the harshness or bad economics which frequently marred its provisions, it was often injudicious in matters of pure legal science. If in some cases it cleared the ground of antiquated rules and forms, in others it merely shore away abruptly and inartistically the more conspicuously inconvenient applications of an old doctrine, while leaving the doctrine itself to create future difficulty. It acted too much with reference to the particular evil dealt with, too little with a view to the law as a whole. It was, in a word, too unmindful of that *elegantia*, that inner harmony and consistency with principle which had been always before the eyes of the elder jurists. Legal style and diction experienced a similar declension. From and after the days of Diocletian, the language of imperial ordinances grows more and more rhetorical, pompous, and turgid. The imperial utterances had never emulated the scrupulous exactitude and technicality of the republican *leges*. But they were, during the first two centuries of the Empire, simple and concise. Afterwards, while becoming more

[1] Many of Diocletian's rescripts are well expressed and show a mastery of the old legal principles.

prolix they became also less exact. These faults are, to be sure, not mainly due to the more palpably despotic position of the Emperor, but rather to the steady deterioration of juridical and literary capacity which mark these later centuries. That the decline was less evident in the department of law than in most other branches of intellectual life may be ascribed, partly to the nature of the subject, which does not invite florid treatment, partly to the absence of Greek rhetorical models, Greek being eminently the language of rhetoric, partly, perhaps, also to the influence of the two great law schools of Beyrut and Constantinople, and to the fact that the writings by which the lawyer's mind was formed were still the admirable works of the luminaries of the early Empire. Still the fall is a great one. How much more repellent is the extreme of over-ripe laxity than the extreme of primitive stiffness may be felt by any one who will compare the weak and wordy 'New Constitutions' (*Novels*) of Justinian with the crabbed strength of the Twelve Tables, abrogated by Justinian himself after a thousand years of reverence. There is, in fact, only one fault which the later imperial legislation may appear to have avoided when we compare it with that of modern England or America. It goes much less into detail. It does not seek to exhaust possible cases, and provide for every one of them. This merit, however, is due, not so much to skill on the part of the Roman draftsmen, as to the range of power allowed to Roman officials and judges, and to the faint recognition of the rights of the individual subject. The tedious minuteness of modern English and American

statutes, if it grieves the scientific lawyer, is after all a laudable recognition and expression of that respect for personal liberty and jealousy of the action of the executive which have distinguished the English race on both sides of the Atlantic. Thus that which might appear to be an excellence of the later imperial legislation in point of form is seen to be an evil in point of substance, for it is due, not to any superiority of legal skill, but to the existence of an autocracy which did not care to limit the discretion of its subordinate officers.

IX. Direct Legislation in England: Parliament.

It remains for us to consider the organ of direct legislation in England, and the work which that organ turns out. Here again I must turn away from the large field of historical inquiry. The history of English statutes, their development out of petitions addressed to the sovereign in his Great Council, the mode in which they were drafted, debated, and passed, the rules of interpretation which have obtained regarding them, their influence at different epochs upon the growth of the Common Law, the development and value of the functions of non-official members of Parliament in preparing them and getting them passed, the decay of those functions which the last few years have seen—all these would supply interesting and instructive matter, not merely for an essay but for a treatise. But seeing how long we have had to wait for a philosophical history of the law of England in general, one need

not be surprised that this particular department still waits for its historian[1].

In England there has been, through the long course of our history, only one organ of Direct Legislation, viz. the Great Council of the nation. It began as a Primary Assembly of all freemen. It passed, between the time of Athelstan and that of Henry III, through a phase in which it had, owing to the growth of the nation and to the practical limitation of its membership, almost ceased to be Primary in fact, though its theoretical character, as embracing the whole people, had not been abrogated. Since the time of Edward I it has consisted of two branches, one of which is Primary, the other Representative; and this present phase is evidently drawing to its end.

Thus the history of Direct Legislation in England stands contrasted with the history of such legislation in Rome in two points: (1) that we in England have always had an organ which in intendment of law was the same from beginning to end, and admittedly supreme; and (2) that we have never had more than one organ at the same time, whereas at Rome the theoretically complete and unrestricted legislative power of the popular Assembly coexisted, for a time, with the legislative power of the Senate, and the theoretically complete and unrestricted legislative power of the

[1] The admirable *History of English Law* of Professors Pollock and Maitland stops soon after the point at which parliamentary legislation begins. Since the passage in the text was written, the book of Sir C. P. Ilbert, entitled *Legislative Methods and Forms*, has been published. It is full of valuable information and acute remarks upon modern English legislation, and brings together a mass of historical facts never previously collected.

Senate coexisted for a certain period with the legislative power (stronger, but at first carefully disguised) of the Emperor. It may seem absurd to speak of two organs of direct legislation as each complete and supreme: yet such would seem to have been the theory of the Roman law. We in England came near having a similar state of things in the days when the Crown claimed, and was sometimes permitted to exert, a power of legislating apart from Parliament and not in virtue of any permission by Parliament. But this power was never formally recognized by the law.

The Parliament of the United Kingdom and that eldest and strongest of its numerous progeny, the Congress of the United States, seem at first sight well composed and admirably equipped for securing legislation which shall be excellent in point both of Substance and of Form. As to excellence of Substance, these assemblies ought to be able to make such laws as the people wish and need, for they are popular in character, giving full expression to the wishes of all classes, and enabling any person or section aggrieved by existing defects in the law to state his complaints and suggest a remedy for them. The British Parliament, moreover, consists of two Houses, one of which, while deficient in the strength that comes from popular election, is by its composition capable of looking at questions from a point of view unlike that of the Lower House. It contains many men of great ability and knowledge of affairs, so that it could well discharge (if so disposed) the functions of criticism and revision. So the American Congress has also the advantage of being composed of two

branches, either of which can criticize and amend the Bills passed by the other.

As regards excellence of Form, which is that with which we are here specially concerned, several notable merits may be claimed for the British Parliament. The House of Lords, as has been just observed, contains among the fifty or sixty persons (out of nearly six hundred members) who habitually attend its sittings not a few possessing intellectual power and practical experience, with (usually) some seven or eight distinguished lawyers, the flower of the legal profession. Being a representative body, the House of Commons contains persons who are presumably above the average in knowledge of the world and its affairs, as well as in intellectual capacity. Among these there are to be found many men (though a smaller proportion than is found in the American Congress or in some colonial legislatures) who possess a technical acquaintance with the laws of the country, and ought to be specially well fitted to amend them, while at the same time any such tendency as professional men might have to indulge in mere technicalities is likely to be corrected by the presence of a majority of laymen. They deliberate in full publicity, and thereby can obtain from all quarters suggestions that may direct or help them. They are responsible to those who have sent them up, and who can closely watch their conduct. Ample opportunities are provided for the discussion of every measure, and for curing any defect which may lurk in any Bill brought forward either by the Ministers of the Crown, liable through their position to a fire of hostile criticism, or by a private member. Every Bill has to pass through

seven stages in the House of Commons[1], and six in the House of Lords, and at each of these stages it may be debated at indefinite length[2]. That must be, one would think, either a very trivial or a strangely hidden blemish which escapes the notice of keen, experienced, and often unfriendly critics on twelve successive occasions[3]. Could any machinery be better adapted to secure that the laws passed shall be expressed in the most clear and precise terms, that each shall be well arranged and self-consistent, that every new statute shall be properly fitted into those that have gone before, and shall, in effecting any change, repeal expressly the parts of previous statutes which it affects, so as to provide against possible uncertainty or discrepancy?

Why is it then that we hear so many complaints about the condition of the laws of England as to the number of points which remain unsettled, as to the confusion in which some great departments of law lie, as to the undue length of our statutes, their obscurity, their inconsistencies, their omissions? I do not inquire to what extent these complaints are well founded. It is enough to note that they proceed not merely from scientific jurists, who might be supposed to be enamoured of an impossible ideal, but from such practical

[1] Now (1900) reduced to six by the discontinuance of the habit of putting the question that Mr. Speaker do leave the chair when the House of Commons goes into Committee.

[2] Now, however, subject to the power of imposing the closure of debate, a power the growing frequency of whose exercise has greatly altered the character of the House.

[3] Now reduced to eleven. The number of stages for a Bill which passes through both Houses must be calculated by subtracting one from the number reached by adding the stages in each House, because a Bill coming from either House to the other obtains its first reading as a matter of course, without debate.

men as compose our commercial classes, such technically competent as well as practical men as the judges of the land.

Somewhat similar complaints are made in the United States. The methods of legislation used there are generally similar to those of Britain, both in the Federal Congress and in the forty-five State Legislatures, and every one of these bodies consists of two Houses, each jealous of the other. The chief difference is that the Americans consolidate their statutes at certain intervals, so that the statute law, both Federal and State, is brought within a smaller compass than that of the United Kingdom. Subject to this and to some minor dissimilarities, the remarks which follow on the causes why British legislation is less perfect than might be expected from the elaborate machinery provided for producing it apply to the United States also[1].

The methods of British legislation, and the dangers incident to those methods, are exactly the opposite to those which we have noted in Rome. Both under the Republic, when statutes were passed at the instance of a magistrate with no possibility of amendment by the Assembly, and under the later Empire, when the monarch or his advisers could issue a law with as much ease and as little personal fear of consequences as a counsel can draw a will or the articles of a joint stock company, no provision was made for independent criticism, nor for discussion, nor for the interposition of delays. The excellence of the law depended on the

[1] As to the actual methods and difficulties of Parliamentary legislation, see the penetrating and careful analysis contained in Sir C. P. Ilbert's *Legislative Methods and Forms*, chap. x.

person who prepared and proposed it, and on him alone[1]; and the law could be issued to take effect as soon as the Assembly had given its one vote or the Emperor his one signature. The Senate could indeed debate and might amend the forms of decrees submitted to it, but as it was really a mere instrument in the Emperor's hand it exercised these powers very sparingly.

With us in England the opportunities for debate, for resistance, and for amendment are so ample as to prevent many things from being done which ought to be done, and to impress an unscientific cumbrousness, prolixity, and inelegance upon most of the work we turn out. Too many persons are concerned, and few of them have any care or taste for technical excellence. The House of Commons is overloaded with work, some of it work which it had better not attempt, but which it does attempt in deference to the clamorous demands of particular sections of opinion. A reform in the substance of the law excites little interest unless it has either some political (*i.e.* party) importance, or has a considerable pressure of public opinion behind it. A reform in the form and expression of the law, having neither of these forces to back it up, excites no interest at all. Accordingly it is neglected, for a Ministry is disposed to think first of pleasing its own supporters, then of winning popular favour in general, and accordingly gives the time at its disposal to measures deemed likely to secure for it political advantage.

Private (*i.e.* unofficial) members of Parliament might

[1] Although, as observed above, the Emperor might, if he liked, cause a draft Constitution to be debated in his Consistory.

supply what is lacking in the Ministry by bringing forward and passing modest and useful Bills, calculated either to remove minor defects in the substance of the law or to improve its form. But the Ministry now commands so large a part of the available time of the House of Commons, and the opportunities given to members for arresting the progress of other members' bills are so abundant, that hardly anything can be accomplished by an unofficial member. In the United States, where all members are unofficial, the despotism of the British Ministry, which after all is a responsible despotism, is replaced by the irresponsible despotism of the Committees, which are as much disposed as is a British Ministry to be swayed by sectional pressure or by the prospect of political gain.

The British House of Commons is too large for discussing what may be called the technical or formal part of legislation. Its debates in Committee on points of substance are often excellent. But it cares little for harmony, propriety, and conciseness of language. If an inexperienced enthusiast for legal symmetry observes, in proposing an amendment, that his terms will not affect the substance, though they will improve the form, of the clause, he is impatiently rebuked for occupying the time of the House with what 'will make no difference.' On the other hand, changes in substance are constantly made in Committee which have the effect of rendering the form of the measure worse than when it came from the draftsman's hands. Clauses are put in or struck out, exceptions are added, references to other statutes are inserted, which make the sense of the enactment difficult to follow and its

construction uncertain. Sometimes these faults are corrected in that later consideration which is called the Report stage. Sometimes they are not, either because they have escaped notice, or because the Ministry are in a hurry, and do not wish to risk the further raising of questions likely to give trouble. The House of Lords ought to correct all such blemishes. But it seldom does so, either from indolence, or because it does not wish to differ with the House of Commons except where it has some class interest, political or economic, to contend for. In fact, that function of revision which modern theory attributes to the House of Lords is not discharged.

The facilities which Parliamentary procedure affords for delaying the progress of Bills in the House of Commons are so ample, not to say profuse, that the practice has grown up of drafting Bills, not in the form most scientifically appropriate, but in that which makes it easiest for them to be carried through under the fire of debate. To lay down those broad, clear, simple propositions of principle which conduce to the intelligibility and symmetry of the law is to invite opposition, and to make the process of opposing easier for those who desire to resist, but have not the technical knowledge needed for a minute discussion. To bury a principle out of sight under a mass of details; to avoid the declaration of a principle by enacting a number of small provisions, which cover most of the practically important points, yet do not amount to the declaration of a new general rule; to insert a number of exceptions, not in themselves desirable, but calculated to avert threatened hostility;

to hide a substantial change under the cloak of a reference to some previous Act which is to be incorporated with the Act proposed to be passed; to deal with some parts of a subject in one year, and postpone some other parts to be dealt with in another measure next year, while leaving yet other parts to the chances of the future, though all ought to have been included in one enactment;—these are expedients which are repellent to the scientific conscience of the draftsman, but which are forced on him by the wishes of the Minister who is in charge of the Bill and who foresees both the objections that will be taken to it and the opportunities for obstructing it which parliamentary procedure affords. Yet the Minister may well plead that, with the limited time at his disposal, these expedients are essential to the passing of his Bill. Any one can see what complication, what obscurity, what uncertainty in the law must needs result from this way of amending it.

Thus it has come about that our English statute law is more bulky and even more unscientific in its form (whatever the excellence of its matter) than was the statute law of the Roman Empire when Theodosius II, and afterwards Justinian, set themselves to call order out of chaos. No Theodosius II, no Justinian, need be looked for in England. Yet much might be done to reduce the existing statutes into a more manageable mass, and something to improve the form in which they come from the hands of the legislature. The former work, previously in the hands of the Statute Law Commission, has since that body came to an end been entrusted to another body called the Statute Law

Committee, which is conducting a general revision of the statutes. It has issued a Revised Edition coming down to A. D. 1886, and under its auspices a number of useful Consolidation Acts have been passed, whereby the Statute Law, and in a few instances the Common Law also, relating to particular departments has been brought together and enacted as an orderly whole. The more difficult enterprise of providing better methods for turning out new law in a clear, concise, and scientifically ordered form, is rarely discussed, even by lawyers, and seems to excite no public interest. It raises many difficult questions which this is not the place to treat of, so I will be content with observing that the remedy for the present defects of British statutes which seems least inconsistent with our parliamentary methods, would be to refer each Act, after it had passed both Houses, but before it received the royal assent, to a small committee consisting of skilled draftsmen and of skilled members of both Houses, who should revise the form and language of the Act in such wise as, without in the least affecting its substance, to improve its arrangement and its phraseology, the Act being formally submitted once more to both Houses before the royal assent was given, so as to prevent any suspicion that a change of substance had been made. It is, however, unlikely that Parliament will consent to any proposal of this nature; and even if some such expedient were adopted it would, at least in some cases, fail to remove the faults above described, because they are necessarily incident to legislation by large assemblies on matters which excite popular feeling and involve political controversy.

X. Some Reflections suggested by the History of Legislation.

The chief reflections which a study of Roman and English modes of law-making seem to impress upon the inquirer's mind are the three following.

The first is that the law of best scientific quality is that which is produced slowly, gradually, tentatively, by the action of the legal profession. At Rome it was produced by the unofficial jurists under the Republic, by the authorized jurists under the earlier Empire, by the magistrates who framed and went on constantly revising the Edicts from the time of the Punic Wars to that of Hadrian. In England it has been produced by the writers of text-books, but still more by the judges from the time of Glanvil and Bracton down to our own day. Our private law is as much a growth of time as is our Constitution, or as are our ideas on such subjects as economics or ethics. What has been true of the past will be true of the future; and though we can foresee no changes in the future comparable to those which have built up the existing fabric of our law out of the customs of the thirteenth century, we must expect the process of change to continue as long as life itself, and must beware lest by any attempt at finality we should check a development which is the necessary concomitant of health and energy.

The second is that the special point wherein the Roman system had an advantage over our own, and indeed over that of all modern countries, was the existence of an organ of government specially charged with

the duty of watching, guiding, and from time to time summing up in a concise form, the results of the natural development of the law. The Praetor with his Edict is the central figure in Roman legal history, and a unique figure in the history of human progress. The Roman statutes of the Republic were not, except perhaps in their brevity, superior to our statutes down to the time of George III. The imperial constitutions, especially the later ones, are inferior in substance and perhaps not better in form than our later English statutes. The treatises of the Roman lawyers, if more convenient in point of form than our volumes of Reports, contained discussions not more acute and subtle, nor so great a wealth of matter; and they were not more free from discrepancies. But neither England nor the United States has ever had or can have any one who could conduct legal reforms in such a way as did the Praetor.

A third reflection is that the various departments of legislation are not equally well suited to be developed by one and the same organ of legislation. Administrative law can hardly be created except by the direct action of the sovereign power in the State, whether the monarch or the Legislative Assembly acting at the instance of the Executive. In every country that kind of law has been so created, and its growth belongs to a comparatively late stage in the progress of a State. As the need for a more elaborate civil and military administration increases, so does the organ appropriate for legislating on such matters become evolved. A very large part of recent legislation in England[1] and in the

[1] According to Sir C. P. Ilbert (*op. cit.*) nine-tenths.

United States belongs to this category, and similarly a large part of the Codes of Theodosius II and of Justinian are filled by such matters.

A system of procedure, civil and criminal, with the judicial machinery required to work it, may be created either by the direct legislative action of the supreme power, or by custom and the action of the Courts. Both at Rome and in England it was through usage and by the Courts themselves that the earlier system was slowly moulded; both at Rome and in England it was direct legislation that established the later system. Functions discharged by both the Praetor and the Chancellor are the offspring of custom and not of statute. But the judicial system of the Roman Empire, as well as the mode of procedure by *formulae* (established by the *Lex Aebutia* probably about B.C. 200) and the criminal *quaestiones perpetuae* of the later Republic, and similarly all the changes made in English procedure and the English Courts during the last two centuries, culminating in the sweeping reconstruction effected by the Judicature Act of 1873, were the work of direct legislation.

Criminal law has everywhere grown out of Custom, and has in all civilized States been largely dealt with by direct legislation. In most European countries it has been codified by statute, to the general satisfaction of the people; and the conspicuous success of the Indian Penal Code shows that English criminal law is susceptible of being so treated. Thus we may say that all the branches of law which I have enumerated are fit matters for direct legislation by the sovereign power, and less fit to be left to jurists and magistrates.

As to private law in the narrower sense of the term, the law of property, of inheritance, of contracts, of torts, and so forth, it has already been remarked that it was at Rome and is in England the offspring of Custom, that is to say, of the usages of the community, and of the reflections and discussions of lawyers, bringing these usages into a precise shape and developing them in points of detail, together with the decisions of judges stamping them as recognized in those points of detail as well as in their general principles. As time went on, direct legislation was more and more resorted to both at Rome and in England either to define or to change the law which jurists, magistrates, and judges had wrought out of materials provided by custom. It was often necessary, because there were faults in the law which the Courts had not the power, even if they had the wish, to alter. Yet direct legislation has seldom been successful except either in expunging such faults, or in systematizing what was already well settled. Compare, for instance, the modern law of negotiable instruments, built up by the custom of merchants and the Courts, and not reduced to the form of a statute till nearly every question had been thoroughly worked out by lawyers in the course of judicial practice, with the law of Joint Stock Companies, which is mainly the product of direct legislation. The former is as definite and practically convenient as the latter is confused and unsatisfactory. It is quite true that the latter topic is one which could not well have been left to usage and the Courts. Yet such a comparison indicates the difficulties which confront a legislature when it attempts to create *de novo*, that is to say, on general principles and without much

help from custom. The law of Joint Stock Companies with limited liability is one of those departments which needs to be treated by the method of constant experiment, varying from time to time the remedies needed against the new forms in which fraud and trickery appear, and meeting by fresh provisions the devices by which crafty men evade the rules intended to protect the unwary[1].

A magistrate like the Roman Praetor might perhaps deal with such a branch of law more effectively than can either an English judge or the English Parliament—more effectively than a judge, because his powers would be wider; more effectively than Parliament, because he could more promptly and easily drop a provision which had proved inefficient, and try the working of a new one without purporting to make it a part of the permanent law of the land.

It follows from these considerations that some branches of the law are much more fit than others to be embodied in a code, and that the discussions, more frequent and more animated thirty years ago than they are to-day, as to the merits and drawbacks of codification, ought to have distinguished more carefully than they did between the adaptability to diverse departments of law of a system of rules enacted in a form intended to be final. We may hope to have some light upon this subject from the working of the new German Code. In any case, it may be suggested that a society

[1] It must, however, be added that the difficulties which surround this most unsatisfactory branch of our law are partly due to the recurring collision of two different theories, that of *Caveat emptor* (let the buyer beware) and that which would exact *uberrima fides* (the amplest good faith) from a company promoter or director.

in which the ideas and habits that relate to any one side of its life are changing—as for instance those relating to the civil status of women have changed in England during the last fifty years, or in which the methods of business are changing, as those relating to joint stock enterprise have changed both in England and America—does ill to stereotype in a form difficult to amend the particular legal rules which govern it at any given moment, however adequately that form may for the moment embody the substance of those rules.

XV

THE HISTORY OF LEGAL DEVELOPMENT AT ROME AND IN ENGLAND

In the last preceding Essay the organs of legislation, and the methods whereby they were worked at Rome and in England respectively, were discussed and compared. A consideration of the course which legal change took, in its various phases of development, reform or decay, may be completed by inquiring into the general causes and forces which determined and guided the process of change. To justify the selection of Rome and England for comparison it is necessary to recur to two points only in which the history of institutions in these two States presents a remarkable analogy. Both have been singularly independent of outside influences in the development of their political character and their legal institutions. The only influence that seriously told on Rome was that of the Greeks: yet how thoroughly Roman all the institutions that ever had been Roman remained down till the second century of the Empire, after Hellenic influence had for more than two hundred years been playing freely and fully upon literature and thought! So English institutions have been far less affected by external influences than have been those of any other part of European Christendom. In France, Italy, Germany, and Spain, the traces of Roman dominion were never

obliterated, and Roman law too, both through its traditions and through the writings which embody it, has always been a more potent factor than it ever was here. These countries have, moreover, borrowed more from each other than we have done from any one of them, except, perhaps, in the days when Normandy gave a Continental tinge to the immature feudality of England. And, secondly, both Rome and England have extended their institutions over vast territories lying beyond their own limits. Each has been a conquering and ruling power, and the process by which each grew into a World State from being, the one a City and the other a group of small but widely scattered rural tribes, offers striking points of resemblance as well as of contrast. I might add that there are similarities in the character of the two nations, similarities to which their success in conquering and ruling is due. But, for the moment, it is rather to law and institutions than to character that I seek to direct the reader's attention.

Since the law of every country is the outcome and result of the economic and social conditions of that country as well as the expression of its intellectual capacity for dealing with these conditions, the causes which modify the law are usually to be sought in changes which have passed upon economic and social phenomena. When new relations between men arise, or when the old relations begin to pass into new forms, law is called in to adjust them. The part played by speculative theorists or by scientific reformers who wish to see the law made more clear and rational is a relatively small factor in legal change, and one which operates only at rare moments. The process of develop-

ment, if not wholly unconscious, is yet spontaneous and irregular. Alterations are made, not upon any general plan or scheme, but as and when the need for them becomes plain, or when it has at least become the interest of some ruling person or class to make them.

The relation of the general history, political, economic, and social, to changes in laws and institutions is best seen at certain definite epochs. It is indeed true that in nations which have reached a certain stage of civilization the conditions of life, and the relations of men and classes to one another, never remain quite the same from generation to generation. Every mechanical discovery, every foreign war or domestic insurrection, every accession or loss of territory, every religious or intellectual movement leaves things somewhat different from what it found them. Nevertheless, though the process of change is, except in savage or barbarous peoples, practically constant and uninterrupted, it becomes at certain particular moments much more swift and palpable, rushing, so to speak, through rapids and over cataracts instead of gliding on in a smooth and equable flow. These are the moments when a nation, or its ruler, perceives that the economic or social transformations which have been taking place require to be recognized and dealt with by corresponding changes in law and institutions, or when some political disturbance, or shifting of power from one class or group to another, supplies the occasion for giving effect to views or sentiments hitherto repressed. Accordingly it is profitable to give special attention to these transitional epochs, because it is in them that

the relation between causes and consequences can be studied most easily and on the largest scale. Let us see what are the epochs in Roman and in English history which may be selected as those marked by conspicuous legal or institutional changes before we examine the relations of these changes to the forces which brought them about.

I. Five Chief Epochs of Legal Change at Rome.

In the thousand years of Roman history that lie between the first authentic records of the constitution and laws of the city, say 451 B.C., when the Decemviral Commission, which produced the laws of the Twelve Tables, was appointed, and 565 A.D., when Justinian died, having completed his work of codification and new legislation[1], we may single out five such epochs.

1. The epoch of the Decemviral Legislation, when many of the old customs of the nation, which had been for the most part preserved by oral tradition, were written down, being no doubt modified in the process.

2. The days of the First and Second Punic Wars, when the growth of population and trade, the increase of the number of foreigners resident in Rome, and the conquest by Rome of territories outside Italy, began to induce the development of the Praetorship as an office for expanding and slowly remodelling the law.

3. The end of the Republic and early days of the

[1] It is convenient to stop with Justinian, because he gave the law the shape in which it has influenced modern Europe, and because our historical data became much more scanty after his time. But of course the history of the law goes on to A.D. 1204, and in a sense even to A. D. 1453, in an unbroken stream, the codes issued by the later Emperors, and especially the *Basilica* of Leo the Philosopher, being based upon Justinian's redaction.

Empire, when there was a brilliant development of juridical literature, when the opinions of selected jurists received legal authority from the Emperor's commission, when the Senate was substituted for the popular assemblies as the organ of legislation, and when the administration of the provinces was resettled on a better basis—all these changes inducing a more rapid progress of legal reform.

4. The reigns of Diocletian and Constantine, when imperial legislation took a fresh and vigorous start, and when the triumph of Christianity brought a new, a powerful, and a widely pervasive force into the field of politics and legislation.

5. The reign of Justinian, when the plan of codification whose outlines Julius Caesar had conceived, and which Theodosius II had done something to carry out, was at last completed by the inclusion of the whole law of Rome in two books containing the pith of the then existing law, and when many sweeping reforms were effected by new legislation.

It is less easy to fix upon epochs of conspicuous change in English legal institutions and law, because English development has been on the whole more gradual, and because the territorial limits of the area affected by change have not expanded to anything like the same extent as did the territories that obeyed Rome. Rome was a City which grew to be the civilized world: the *Urbs* became *Orbis Terrarum.* The English were, and remain, a people inhabiting the southern part of an island, and beyond its limits they have expanded (except as respects Ireland), not by taking in new territories as parts of their State, but by planting

semi-dependent self-governing States which reproduce England[1]. However, one may, for the sake of a comparison with Rome, take the five following epochs as those at which the process of change became the most swift and the most effective for destruction and creation.

II. Five Epochs of Legal Change in England.

1. The time of Henry II, when the King's Courts became organized, and began to evolve a Common Law for the whole realm out of the mass of local customs.

2. The times of Edward I and Edward III, when the solidification of the kingdom saw the creation of a partly representative legislature, the enactment of important statutes, and the establishment of a vigorous organ for the development and amendment of the law in the Chancellorship.

3. The time of Henry VIII and Edward VI, when the progress of society and an ecclesiastical revolution caused the passing of several sweeping legal reforms, separated the courts and the law of England from a system of jurisprudence which had influenced it in common with the rest of Western Christendom, and permanently reduced the power of the clergy and of clerical ideas.

4. The epoch of the Great Civil War and Revolution, when legislative authority, hitherto shared or disputed by the Crown and the Houses of Parliament, passed definitively to the latter, and particularly to the popular branch of Parliament, and when (as a consequence) the

[1] I do not include India or the Crown Colonies, because the population of these is not English.

relation of the Monarch to the landholding aristocracy, and that of the State to its subjects in religious matters, underwent profound alterations.

5. The reigns of William IV and Victoria, when the rapid growth of manufacturing industry, of trade, and of population, coupled with the influence as well of new ideas in the sphere of government as of advances made in economic and social science, has shaken men loose from many old traditions or prejudices, and has, while rendering much of the old law inapplicable, made a great deal of new legislation indispensable.

Now let us consider what are the forces, influences, or conditions which at all times and everywhere become the sources and determining causes of changes in laws and institutions, these latter being that framework which society constructs to meet its needs, whether administrative or economic or social.

Five such determining causes may be singled out as of special importance. They are these.

1. Political changes, whether they consist in a shifting of power as between the classes controlling the government of a country, or affect the structure of the governmental machinery itself, as for instance by the substitution of a monarch for an assembly or of an assembly for a monarch.

2. The increase of territory, whether as added to and incorporated in the pre-existing home of a nation or as constituting a subject dominion.

3. Changes in religion, whether they modify the working of the constitution of the country or involve the abolition of old laws and the enactment of new ones.

4. Economic changes, such as the increase of industrial production or the creation of better modes of communication, with the result of facilitating the exchange of commodities.

5. The progress of philosophic or scientific thought, whether as enouncing new principles which ultimately take shape in law, or as prompting efforts to make the law more logical, harmonious and compendious.

The influence of other nations might be added, as a sixth force, but as this usually acts through speculative thought, less frequently by directly creating institutions and laws, it may be deemed a form of No. 5.

The two last of these five sources of change, viz. commerce and speculative or scientific thought, are constantly, and therefore gradually at work, while the other three usually, though not invariably, operate suddenly and at definite moments. All have told powerfully both on Rome and on England. But as the relative importance of each varies from one country to another, so we shall discover that some have counted for more in the case of Rome, some in that of England. The differences throw an instructive light on the annals of the two nations.

III. Outline of Legal Changes at Rome.

The legal history of Rome begins with the law of the Twelve Tables. This remarkable code, which, it need hardly be said, was neither a code in the modern sense, nor in the main new law, but rather a concise and precise statement of the most important among the ancient customs of the people, dominated the whole of the republican period, and impressed a peculiar

character upon the growth of Roman law from the beginning till the end of the thousand years we are regarding. It gave a sort of unity and centrality to that growth which we miss in many other countries, England included, for all Roman statutes bearing on private law were passed with reference to the Twelve Tables, nearly all commentaries grouped themselves round it, and when a new body of law that was neither statute nor commentary began to spring up, that new law was built up upon lines determined by the lines of the Twelve Tables, since the object was to supply what they lacked or to modify their enactments where these were too harsh or too narrow. Its language became a model for the form which later statutes received. It kept before the minds of jurists and reformers that ideal of a systematic and symmetrical structure which ultimately took shape in the work of Theodosius II and Justinian. Now the law of the Twelve Tables was primarily due to political discontent. The plebeians felt the hardship of being ruled by customs a knowledge of which was confined to the patrician caste, and of being thereby left at the mercy of the magistrate, himself a patrician, who could give his decision or exert his executive power at his absolute discretion, because when he declared himself to have the authority of the law, no one, outside the privileged caste he belonged to, could convict him of error. Accordingly the plebs demanded the creation of a commission to draft laws defining the powers of the Consuls, and this demand prevailed, after a long struggle, in the creation of the Decemvirs, who were appointed to draft a body of general law for the nation. This draft was

enacted as a Statute, and became thenceforth, in the words of Livy[1], 'the fountain of all public and private law.' Boys learnt it by heart down to the days of Cicero, and he, despite his admiration for things Greek, declares it to surpass the libraries of all the philosophers[2].

For some generations there seem to have been comparatively few large changes in private law, except that declaration of the right of full civil intermarriage between patricians and plebeians, which the Twelve Tables had denied. But the knowledge of the days on which legal proceedings could properly be taken remained confined to the patricians for nearly a century and a half after the Decemvirs. The plebs had, however, been winning political equality, and three or four years after the time when the clerk Flavius revealed these pontifical secrets it was completed by the admission of the plebeians to the offices of pontiff and augur.

Meanwhile Rome was conquering Italy. The defeat of Pyrrhus in B.C. 275 marks the virtual completion of this process. A little later, the First Punic War gave her most of Sicily as well as Sardinia and Corsica, and these territories became provinces, administered by magistrates sent from Rome. She was thus launched on a policy of unlimited territorial expansion, and one

[1] 'Decem tabularum leges quae nunc quoque in hoc immenso aliarum super alias acervatarum legum cumulo fons omnis publici privatique est iuris' (iii. 34).

[2] 'Bibliothecas mehercule omnium philosophorum unus mihi videtur xii tabularum libellus, siquis legum fontes et capita viderit, et auctoritatis pondere et utilitatis ubertate superare' (*De Orat.* i. 44). An odd comparison, and one in which there is more of patriotism than of philosophy.

of its first results was seen in two remarkable legal changes. The increase in the power and commerce of Rome, due to her conquests, had brought a large number of persons to the city, as residents or as sojourners, who were not citizens, and who therefore could not sue or be sued according to the forms of the law proper to Romans. It became necessary to provide for the litigation to which the disputes of these aliens (*peregrini*) with one another or with Romans gave rise, and accordingly a Magistrate (*Praetor peregrinus*) was appointed whose special function it became to deal with such disputes. He was a principal agent in building up by degrees a body of law and a system of procedure outside the old law of Rome, which received the name of *ius gentium* (the law of the nations) as being supposed to embody or be founded on the maxims and rules common to the different peoples who lived round Rome, or with whom she came in contact[1]. Through the action of the older Urban Praetor much of this *ius gentium* found its way into the law administered to the citizens, in the way described in the last preceding Essay. Similarly the Proconsuls and Propraetors, who held their courts in the subject provinces, administered in those provinces, besides the pure Roman law applicable to citizens, a law which, though much of it consisted of the local laws and customs of the particular province, had, nevertheless, a Roman infusion, and was probably in part, like the *ius gentium*, generalized from the customs found operative among different peoples, and therefore deemed to represent general principles

[1] As to the *ius gentium* see Essay XI, p. 128 sqq.

of justice fit to be universally applied. The Edicts which embodied the rules these magistrates applied became a source of law for the respective provinces[1].

These remarkable changes, which may be said to belong to the period which begins with the outbreak of the First Punic War (B.C. 264), started Roman law on a new course and gave birth to a new set of institutions whereby new territories, ultimately extended to embrace the whole civilized world, were organized and ruled. It was through these changes that the law and the institutions of the Italian City became so moulded as to be capable not only of pervading and transforming the civilizations more ancient than her own, but of descending to and influencing the modern world. Now these changes, like those which marked the period of the Twelve Tables, had their origin in political events. In the former case it was internal discontent and unrest that were the motive forces, in the latter the growth of dominion and of trade, trade being the consequence, not so much of industrial development as of dominion. But in both cases—and this is generally true of the ancient world as compared with the modern—political causes play a relatively greater part than do causes either of an economic or an intellectual and speculative order[2].

[1] As to this see Essay II, vol. i. p. 91.

[2] Of course I do not mean to disparage the immense importance of economic causes always and everywhere, but in the ancient world, where communities were mostly small, they tended more quickly to engender political revolutions, and thus their action became involved with politics. In the modern world, where nations are mostly large and political change is usually more gradual, economic factors frequently tell upon society and affect the working of institutions without leading to civil strife. The more the world develops and settles down, and the further it moves away from

How much is to be set down to external influences? The Roman writers tell us of the sending out of a body of roving commissioners to examine the laws of Athens and other Greek cities to collect materials for the preparation of the Twelve Tables. So too the contact of Rome with the Greek republics of Southern Italy in the century before the Punic Wars must have affected the Roman mind and contributed to the ideas which took shape in the *ius gentium*. Nevertheless any one who studies the fragments of the Twelve Tables will find in them comparatively few and slight traces of any foreign influence; and one may say that both the substance of the Roman law and the methods of procedure it followed remain, down till the end of the Republic, so eminently national and un-Hellenic in their general character that we must assign a secondary part to the play of foreign ideas upon them.

The next epoch of marked transition is that when the Empire of Rome had swollen to embrace the whole of the West except Britain and Western Mauretania, and the whole of the known East except Parthia[1]. It was the epoch when the Republican Constitution had broken down, not merely from internal commotions, but under the weight of a stupendous dominion, and it was also the epoch when the philosophies of Greece had made the Roman spirit cosmopolitan, and dissolved the intense national conservatism in legal matters which distinguished the older jurists. Here, therefore, two forces were at work. The one was political. It laid the founda-

its primitive conditions, the greater becomes the relative significance of the economic elements.

[1] 'Parthos atque Britannos' are aptly coupled by Horace as the two peoples that remained outside the Empire.

tions of new institutions, which ripened into the autocracy of the Empire. It substituted the Senate for the popular Assembly as the organ of legislation. It gave the head of the State the power of practically making law, which he exercised in the first instance partly as a magistrate, partly through the practice of issuing to selected jurists a commission to give answers under his authority [1]. The other force was intellectual. It made the amendment of the law, in a liberal and philosophical sense, go forward with more boldness and speed than ever before, until the application of the new principles had removed the cumbrousness and harshness of the old system. But it should be remembered that this intellectual impulse drew much of its power from political causes, because the extension of the sway of Rome over many subject peoples had accustomed the Romans to other legal systems than their own, and had led them to create bodies of law in which three elements were blent—the purely Roman, the provincial, and those general rules and maxims of common-sense justice and utility which were deemed universally applicable, and formed a meeting-ground of the Roman and the provincial notions and usages. So here too it is political events that are the dominant and the determining factor in the development both of private law and of the imperial system of government, things destined to have a great future, not only in the form of concrete institutions adopted by the Church and by mediaeval monarchy, but also as the source of creative ideas which continued to rule men's minds for many generations.

[1] Described in the last preceding Essay, p. 257.

Nearly three centuries later we come to another epoch, when two forces coincide in effecting great changes in law and in administration. The storms that shook and seemed more than once on the point of shattering the fabric of the Empire from the time of Severus Alexander to that of Aurelian (A.D. 235 to 270), had shown the need for energetic measures to avert destruction; and the rise to power of men of exceptional capacity and vigour in the persons of Diocletian and Constantine enabled reforms to be effected which gave the imperial government a new lease of life, and made its character more purely despotic. Therewith came the stopping of the persecution of the Christians, and presently the recognition of their religion as that which the State favoured, and which it before long began to protect and control. The civil power admitted and supported the authority of the bishops, and when doctrinal controversies distracted the Church, the monarchs, beginning from Constantine at the Council of Nicaea, endeavoured to compose the differences of jarring sections.

These changes told upon the law as well as upon institutions. New authorities grew up within the Church, and these authorities, after long struggles, obtained coercive power. Not only was the spirit of legislation in such subjects as slavery and the family altered—marriage and divorce, for instance, began to be regarded with new eyes—but a fresh field for legislation was opened up in the regulation of various ecclesiastical or semi-ecclesiastical matters, as well as in the encouragement or repression of certain religious opinions. The influence on law of Greek customs, which seemed to have been expunged by the extension of citizenship

to all subjects a century before Constantine, makes itself felt in his legislation.

Besides these influences belonging to the sphere of politics and religion, economic causes, less conspicuous, but of grave moment, had also been at work in undermining the social basis of the State and inducing efforts to apply new legislative remedies. Slavery and the decline of agriculture, particularly in the Western half of the Empire, throughout which there seems to have been comparatively little manufacturing industry, had reduced the population and the prosperity of the middle classes, and had exhausted the source whence native armies could be drawn. Thus social conditions were changing. The growth of that species of serfdom which the Romans called *colonatus* belongs to this period. The financial strain on the government became more severe. New expedients had to be resorted to. All these phenomena, coupled with the more autocratic character which the central government of the Empire took from Diocletian onwards, induced a greater and sometimes indeed a hasty and feverish exuberance of legislation, which was now effected solely by imperial ordinances.

Industrial decay seems to have been more rapid in Western than in the Eastern provinces, though palpable enough in such regions as Thrace and Greece. But everywhere there was an intellectual decline, which appeared not least in the sinking of the level of juristic ability and learning. The great race of jurists who adorned the first two and a half centuries of the Empire had long died out. We hear of no fertile legal minds, no law books of merit deserving to be remembered,

during the fourth and fifth centuries of our era. The mass of law had however increased, and the judges and practising advocates were, except in the larger cities, less than ever capable of dealing with it. The substitution of Roman for provincial law effected by the Edict of the Emperor Antoninus Caracalla had introduced some confusion, especially in the Eastern provinces, where Greek or Oriental customs were deeply rooted, and did not readily give place to Roman rules. The emperors themselves deplore the ignorance of law among practitioners: and presently it was found necessary to prescribe an examination for advocates on their admission to the bar. Accordingly the necessity for collecting that which was binding law and for putting it into an accessible form became greater than ever. It had in earlier days been an ideal of perfection cherished by theorists; it was now an urgent practical need. It was not the bloom and splendour but the decadence of legal study and science that ushered in the era of codification. A century after the death of Constantine, the Emperor Theodosius II, grandson of Theodosius the Great, reigning at Constantinople from A.D. 408 to A.D. 450, issued a complete edition of the imperial constitutions in force, beginning from the time of Constantine, those of earlier Emperors having been already gathered into two collections (compiled by two eminent jurists) in current use. Shortly before a statute had been issued giving full binding authority to all the writings (except the notes of Paul and Ulpian upon Papinian) of five specially famous jurists of the classical age (Papinian, Paul, Gaius, Ulpian, Modestinus). The advisers of Theodosius II had intended to codify the whole law, includ-

ing the ancient statutes and decrees of the Senate and Edicts of magistrates so far as they remained in force, as well as the writings of the jurists, but the difficulties were too great for them, and they contented themselves with a revised edition of the more recent imperial constitutions.

Justinian was more energetic, and his codification of the whole law of the Empire marks an epoch of supreme importance in the history not merely of Rome but of the civilized world, for it is possible that without it very little of the jurisprudence of antiquity would have been preserved to us, so that the new nations which were destined to emerge from the confusion of the Dark Ages might have lacked the foundation on which they have built up the law of the modern world. It is indeed an epoch which stands alone both in legal and in political history.

Justinian's scheme for arranging and consolidating the law included a compilation of extracts from the writings of the jurists of the first three centuries of the Empire, together with a collection of such and so many of the Constitutions of the Emperors as were to be left in force, both collections being revised so as to bring the contents of each into accord and to harmonize the part of earlier date (viz. that which contained the extracts from the old jurists) with the later law as settled by imperial ordinances. It was completed in the space of six years only—too short a time for so great a work. It was followed by a good deal of fresh legislation, for the Emperor and his legal minister Tribonian, having had their appetite whetted, desired to amend the law in many further points and

reduce it to a greater symmetry of form and perfection of substance. The Emperor moreover desired, for Tribonian was probably something of a Gallio in such matters, to give effect to his religious sentiments both by laying a heavy hand on heretics and by making the law more conformable to Christian ideas. Thus the time of Justinian is almost as significant for the changes made in the substance of the law as for the more compendious and convenient form into which the law was brought.

Some thirty years before the enactment of Justinian's Codex and Digest (which, though intended for the whole Empire, did not come into force in such Western provinces as had already been lost) three collections of law had been made by three barbarian kings for the governance of their Roman subjects. These were the *Edictum* of Theodorich, King of the East Goths, published in A. D. 500, the *Lex Romana Visigothorum*, commonly called the *Breviarium Alaricianum*, published by Alarich II, King of the West Goths (settled in Aquitaine and Spain), in A. D. 506, a year before his overthrow by Clovis, and the *Lex Romana Burgundionum*, published by the Burgundian King Sigismund in the beginning of the sixth century. These three compilations, each of which consists of a certain number of imperial Constitutions, with extracts from a few jurists, ought to be considered in relation to Justinian's work, partly because each of them did for a part of the Roman West what he did for the East, and, as it turned out, for Italy and Sicily also, when Belisarius reconquered those countries for him, and partly because they were due to the same need for

accessible abridgements of the huge mass of confused and scattered law which prompted the action of Justinian himself. They are parts of the same movement, though they have far less importance than Justinian's work, and, unlike his, include little or no new law.

The main cause of the tendency to consolidate the law and make it more accessible was the profusion with which Diocletian and his successors had used their legislative power, flooding the Empire with a mass of ordinances which few persons could procure or master, together with the decline of legal talent and learning, which made judges and advocates unable to comprehend, to appropriate and to apply the philosophical principles and fine distinctions stored up in the treatises of the old jurists. Here, therefore, political and intellectual conditions, conditions rather of decline than of progress, lay at the root of the phenomenon. But in the case of Justinian something must also be credited to the enlightened desire which he, or Tribonian for him, had conceived of removing the complexities, irregularities and discrepancies of the old law, bringing it nearer to what they thought substantial justice, and presenting it in concise and convenient form. Plato desired to see philosophy in the seat of power, and in Justinian philosophic theory had a chance such as it seldom gets of effecting permanently important changes by a few sweeping measures. Yet theory might have failed if it had not been reinforced by the vanity of an autocrat who desired to leave behind him an enduring monument.

This rapid survey has shown us that two forces were always operative on the development of Roman law—internal political changes and the influence of

the surrounding countries. As Rome conquered and Romanized them, they compelled her institutions to transform themselves, and her law to expand. Economic conditions, speculative thought and religion had each and all of them a share in the course which reforms took, yet a subordinate share.

IV. Outline of the Progress of Legal Changes in England.

Let us now turn to England and see what have been the forces that have from time to time brought about and guided the march of legal change, and what have been the relations of that change to the general history of the country.

As with Rome we began at the moment when the ancient customs were first committed to writing and embodied in a comprehensive statute, so in England it is convenient to begin at the epoch when the establishment of the King's Courts enabled the judges to set about creating out of the mass of local customs a body of precedents which gave to those customs definiteness, consistency and uniformity. Justice, fixed and unswerving justice, was in the earlier Middle Ages the chief need of the world, in England as in all mediaeval countries; and the anarchy of Stephen's reign had disposed men to welcome a strong government, and to acquiesce in stretches of royal power that would otherwise have been distasteful. Henry II was a man of great force of character and untiring energy, nor was he wanting in the talent for selecting capable officials. He had to struggle, not only against the disintegrating tendencies of feudalism, but also against the pretensions

of the churchmen, who claimed exemption from his jurisdiction, and maintained courts which were in some directions formidable rivals to his own. He prevailed in both contests, though it was not till long after that the victory was seen to have remained with the Crown. It was his fortune to live at a time when the study of law, revived in the schools of Italy, had made its way to England, where it was pursued with a zeal which soon told upon the practice of the Courts, sharpening men's wits and providing for them an arsenal of legal weapons. It is true that the law taught at the Universities was the Roman law, and that the practitioners were almost entirely ecclesiastics. Now the barons, however jealous they might be of the Crown, were not less jealous of ecclesiastical encroachments and of the imperial law. They could not prevent judges from drawing on the treasures which the jurists of ancient Rome had accumulated, but they did prevent the Roman law from becoming recognized as authoritative; so that whatever it contributed to the law of England came in an English guise, and served rather to supplement than to supersede the old customs of the kingdom.

In this memorable epoch, which stamped upon the common law of England a character it has never lost, the impulse which the work of law-making received came primarily from the political circumstances of the time, that is, from the desire of the king to make his power as the receiver of taxes and the fountain of justice effective through his judges, and from the sense in all classes that the constant activity of the Courts in reducing the tangle of customs to order, no less than the occasional activity of the king when he enacted

with the advice and consent of his Great Council statutes such as the Constitutions of Clarendon, was a beneficial activity, wholesome to the nation. But though political causes were the main forces at work, much must also be allowed to the influence of ideas, and particularly to the intellectual stimulus and the legal training which the study of Roman jurisprudence had given to the educated men who surrounded and worked for the king and the bishops.

The development of English institutions has been at all times so slow and so comparatively steady that it is not easy to fix upon particular epochs as those most conspicuously marked by change. However I take the epoch of Edward I and Edward III. Under Edward I, whose reign was one of comparative domestic tranquillity, the organ of government whose supreme legislative authority was to become unquestioned took its final shape in passing from a Great Council of magnates to an Assembly consisting of two Houses, in one of which the chief tenants of the Crown sat, while the other was composed of representatives of the minor tenants and of boroughs. Under his grandson the chief judicial Minister of the Crown began to sit as a Court, granting redress in the name of the Crown in cases or by methods which the pre-existing Courts were unable or unwilling to deal with. Parliament passed under Edward I some statutes of the first magnitude, such as *Quia Emptores* and *De Donis Conditionalibus*, which impressed a peculiar character on the English land system, and introduced some valuable improvements in the sphere of private rights and remedies. But the legislature was, for two or three centuries, in the main content to leave the building

up of the law to the old Common Law Courts and (in later days) to the Chancellor. The action of this last-named officer was, during the fifteenth, sixteenth and seventeenth centuries, of capital importance, so that the establishment of his jurisdiction is one of the landmarks of our legal history. It was really a renewal, two hundred years after Henry II's time, of that king's effort to secure the due administration of justice through the realm, but it grew up naturally and spontaneously, with less of conscious purpose than Henry II had shown. Both the legislature and the Chancellor were the outcome of political causes, but it must not be forgotten that in the methods taken by the Chancellor (hardly reduced to a system till the seventeenth century) we find the working of a foreign influence which thereafter disappears from English law, that, namely, of the civil and canon laws of Rome and of the Roman Church, for the Chancellors of the fourteenth and fifteenth centuries were all ecclesiastics and drew largely from Roman sources.

The days of the Reformation bring two new and powerful influences to bear upon laws and institutions. One of these influences is economic, the other religious. The growth of industry and trade had so far disintegrated the old structure of society and brought about new conditions that not a few new laws, among which the most familiar and significant are the Statute of Uses and the Statute of Wills, were now needed. The nation was passing out of the stiffness of a society based on landholding and recognizing serfdom into a larger and freer life. At the same time the religious revolution which severed it from Rome, which was accompanied

by the dissolution of the monasteries, and which ended by securing the ascendency of a new body of theological ideas and of simpler forms of worship, involved many legal changes. The ecclesiastical courts were shorn of most of their powers, and the law they administered was cut off from the influences that had theretofore moulded and dominated it. The position of the clergy was altered. New provisions for the poor soon began to be called for. New tendencies, the result of a bolder spirit of inquiry, made themselves felt in legislation. One sees them stirring in the mind of Sir Thomas More. It was some time before the religious and economic changes took their full effect upon the law. But nearly all the remarkable developments that make the time of Henry VIII and Elizabeth an epoch of legal change, may be traced not so much to politics as to the joint influence of commerce (including the growth of personal, as distinguished from real, property) and of theology. Even the oceanic power and territorial expansion of England, which began with the voyages of Drake and the foundation of the Virginia Company and of the East India Company, did not affect either the law or the institutions of the country. The establishment of distant settlements was largely the result of the growing force of commercial enterprise, in which there was at first very little of political ambition, though it cordially lent itself to a political antagonism first to Spain and then to France.

With the time of the Great Civil War we return to an era in which, though religion and commerce continue to be potent forces, the first place must again be assigned to political causes. The struggle which over-

threw the old monarchy effected two things. It extinguished the claims of the Crown to a concurrent legislative or quasi-legislative power. The two Houses of Parliament were established as an engine for effecting legal changes, prompt in action and irresistible in strength[1]. Towards this England had long been slowly tending, as during a century before Augustus Rome slowly tended to a monarchy. The work was completed at the Boyne and Aughrim, but the decisive blow was struck at Naseby. And, secondly, it occasioned the accomplishment of several broad and sweeping reforms in institutions as well as in law proper. A Parliamentary Union of England, Scotland and Ireland was effected which, though annulled by the Restoration, was a significant anticipation of what the following century was to bring. The old system of feudal tenure and the relics of feudal finance were abolished. New provisions were made, and old ones confirmed and extended, for the protection of the freedom of the subject in person and estate. Commercial transactions were regulated, perhaps embarrassed, by a famous enactment (the Statute of Frauds) regarding the evidence required to prove a contract. Such of these things as lay outside the purely political sphere were due partly to the development of industry and commerce, which had gone on apace during the reign of James I, and was resumed during the government of Cromwell and Charles II, partly to that sense which political revolutions bring with them, that the time has come

[1] As Milton says :—

> 'And that two-handed engine at the door
> Stands ready to strike once and strike no more.'

for using the impulse of liberated forces to effect forthwith changes which had for a long time before been in the air. On a still larger scale, it was the Revolution and Empire in France that led to the remodelling of French institutions and the enactment of Napoleon's Codes [1].

As usually happens, an era of abnormal activity in recasting institutions and in amending the law was followed by one of comparative quiescence. It was not till the middle of the reign of George III that the beginnings of a new period of transition were apparent, not till after the Reform Bill of 1832 that the largest among the many reforms towards which men's minds had been ripening were effected. These reforms, which have occupied the last sixty-seven years, have touched every branch of law. They include a great mitigation of the old severity of the criminal law and the introduction of provisions for repressing those new offences which are incident to what is called the progress of society. They have expunged the old technicalities of pleading by which justice was so often defeated. They have striven to simplify legal procedure, though they have not succeeded in cheapening it, and have fused the ancient Courts of Common Law with those of Equity. They have removed religious disqualifications on the holding of offices and the exercise of the suffrage. They have dealt with a long series of commercial problems, and have in particular made easy the creation of corporations for business and other purposes, given limited liability to their members, and

[1] Although the Napoleonic government was in many things only completing work begun under Lewis the Fourteenth.

laid down many regulations for their management. They have altered the law of land, enlarging the powers of life owners, and rendering it easier to break entails. They have reorganized the fiscal system, simplified the customs duties, and established a tariff levied for revenue only. They have codified the law, mainly customary in its origin, relating to such topics as negotiable instruments, sale and partnership. They have created an immense body of administrative law, extending and regulating the powers of various branches of the central government, and, while remodelling municipal government, have created new systems of rural local government. As regards the central institutions of the country, several new departments of State have been called into being. Ecclesiastical property has been boldly handled, though not (except in Ireland) diverted to secular uses; a new Court of Appeal for causes coming from the extra-Britannic dominions of the Crown has been set up, and the electoral franchise has been repeatedly extended.

These immense changes have been due to three influences. The first was the general enlightenment of mind due to the play of speculative thought upon practical questions which marked the end of last and the beginning of this century, and of which the most conspicuous apostles were Adam Smith in the sphere of economics and Jeremy Bentham in the sphere of legal reform. The second was the rapid extension of manufacturing industry and commerce, itself largely due to the progress of physical science, which has placed new resources at the command of man both for the production and for the transportation of commodities. The

third influence was political, and was itself in large measure the result of the other two, for it was the combination of industrial growth with intellectual emancipation that produced the transfer of political power and democratization of institutions which went on from the Roman Catholic Emancipation Act of 1829 to the Local Government Act of 1894. Could we imagine this industrial and intellectual development to have failed to work on political institutions as it in fact did work, it would hardly the less have told upon administration and upon private law, for the new needs would under any form of government, even under an oligarchy like that of George II's time, have given birth to new measures fitted to deal with them. The legislation relating to Joint Stock Companies (beginning with the Winding-Up Acts), which filled so important a place in the English Statute-book from 1830 to 1862, and which still continues, though in a reduced stream, would under any political conditions have been required owing to the growth of commerce, the making of railways, the increased need for the provision of water, gas and drainage. And there went on, hand and hand with it, an equally needed development by the Courts of Equity of the law of partnership, of agency and of trusts, as applied to commercial undertakings. What the political changes actually did was to provide a powerful stimulus to reform, and an effective instrument for reform, while reducing that general distaste for novelties which had been so strong in the first half of the eighteenth century.

If we now review the general course of changes in institutions and law in the two States selected for comparison we shall be struck by two points of difference.

V. Some Differences between the Development of Roman and that of English Law.

The branch of private law which is most intimately connected with the social and economic habits of a nation, and which, through social and economic habits, most affects its character, is that branch which touches Property, and the connexion of property with the Family. The particular form which the institutions relating to property, especially immovable property, take, tells upon the whole structure of society, especially in the earlier stages of national growth. The rules, for instance, which govern the power of an owner to dispose of his property during his life or by will, and those which determine the capacity of his wife and children to acquire for themselves by labour or through gift, and to claim a share in his estate at his decease if he dies intestate, or even against his last will—these rules touch the richer and middle classes in a community and affect their life. So one may perhaps say that the development of this branch of law comes nearer than any other to being the central line of legal development, bearing in mind that it is the needs and wishes of the richer and middle classes which guide the course of legal change. Here, however, we discover an interesting point of comparison between Roman and English legal history.

At Rome it is the history of the Family, especially as taken on its economic or pecuniary side, the most important part of which is the Law of Inheritance, that plays the largest part. The old rules, which held the Family together, and vested in the father the control of family property, were at first stringent. From the third

century B.C. onwards they began to be modified, but they were so closely bound up with the ideas and habits of the people that they yielded very slowly, and it was not till the bold hand of Justinian swept away nearly all that remained of the ancient rules of succession, and put a plain and logical system in their place, that the process was complete.

In England, on the other hand, it is the Law of Land that is the most salient feature in the economico-legal system of the Middle Ages. Among the Teutons the Family had not been, within historic times at least, a group closely bound together as it was among the Italians, whereas the historical and political conditions of the eleventh and twelfth centuries had in Western Europe made landholding the basis of nearly all social and economic relations. Hence the land customs then formed took a grip of the nation so tight that ages were needed to unloose it. The process may be said to have begun with a famous statute (*Quia Emptores*) in the reign of Edward I. Its slow advance was quickened in the seventeenth century by political revolution; and the Act of 1660 which abolished knight service recorded a great change. The peaceful revolution of 1832 gave birth to the series of statutes which from 1834 down to our own day have been reshaping the ancient land system, but reshaping it in a more piecemeal and perplexing fashion than that in which Justinian reformed the law of succession by the 118th and 127th Novels. Problems connected with landholding still remain in England, as they do in nearly all States, especially where population is dense; but they differ from the old problems, and though disputes relating to the taxation of land give

trouble, and may give still more trouble, questions of tenure have lost the special importance which made them once so prominent in our legal history.

Both Rome and England have been, far beyond any other countries except Russia, expanding States. Rome the City became Rome the World-State. The Folk of the West Saxons went on growing till it brought first the other kingdoms of South Britain, Teutonic and Celtic, then the adjoining isles of Ireland and Man, then a large part of North America, then countless regions far away over the oceans under the headship of the descendants of Cerdic and Alfred. But in the case of Rome this expansion by conquest was the ruling factor in political and legal evolution, the determining influence by which institutions were transformed. In England, on the other hand, it is the relations of classes that have been the most active agency in inducing political change, and the successive additions of territory have exerted a secondary influence on institutions and an insignificant influence on law. Not only has English law been far less affected (save at the first two of the five epochs above described) by foreign law or foreign thought than Rome was, but the increase of England by the union, first of Scotland and then Ireland, and by the acquisition of transoceanic dominions, has not interrupted the purely insular or national development of English law. The conquest of Ireland, which began in the twelfth century but was not completed till the seventeenth, made no difference, because Ireland, always since the twelfth century far behind England in material progress and settled social order, received a separate civil administration with

separate Courts. As these Courts administered English law, they followed in the path which England had already travelled and did not affect the progress of law in England. Nothing speaks more of the long-continued antagonism of the Teutonic and the Celtic elements in Ireland, and of the dominance of the Teutonic minority over the Celtic majority, than the practical identity of the common law in the two countries, and the total absence of any Celtic customs in that law. The few and comparatively slight differences which exist to-day between the law of England and that of Ireland are all due to statute. One is the absence of judicial divorce in Ireland, which an Act passed so recently as 1857 introduced in England. The second is to be found in the law relating to land, largely altered by statutes passed for Ireland by the British Parliament of our own time. The third is the existence in Ireland of what are admitted to be exceptional and supposed to be temporary penal provisions, the last of which is the Prevention of Crime Act of 1887. As regards Scotland, when her king became king of England, and when, a century later, her Parliament was united with that of England, she retained her own law intact. In some few respects her law, founded on that of Rome, and her system of judicial administration are better than those of England, nor has she failed to contribute distinguished figures to the English bench and bar; but, as she stands far below England in population and wealth, she has affected the law of the larger country as little as the attraction of the moon affects the solid crust of the Earth.

The vaster territorial expansion of the eighteenth and nineteenth centuries has told quite as little on the

law of England as did the unions with Scotland and Ireland. When the English began to people what are now the self-governing colonies, and when India came under British sway, English law was too fully developed to be susceptible to influences from them, not to add that they were too distant to make any assimilation either desirable or possible. Had India lain no further from England than Sicily and the Greek cities lay from Rome, had she been as near the level of English civilization as those countries were to that of Roman civilization, and had she been conquered in the reign of Elizabeth instead of in the reign of George III, the history of English institutions and English law must have been wholly unlike what it has in fact been. These three differences measure the gulf which separates the course of English from that of Roman development.

Another salient point in which the two States may be compared relates to the smaller part which purely political as compared with economic and intellectual changes have played in the development of English laws and institutions. Although there is a sense in which every political change may be described as the result of an economic or intellectual change, or of both taken together, still it is true that at Rome the desire to grasp political power counted for more in the march of events than it has done in England.

Economic changes sometimes operate on politics by raising the material condition of the humbler class and thereby disposing and enabling them to claim a larger share of political power. This happened at Rome more frequently in the earlier than in the later days of the Republic. In England it has happened more in

later times than it did in earlier. Sometimes, however, economic causes so depress the poor that their misery becomes acute or their envy intense, whence it befalls that they break out into revolt against the rich. This was on the point of happening more than once at Rome, but has been no serious danger in England since the days of Richard II. Sometimes, again, the growth of immense fortunes and the opportunities of gaining wealth through politics threaten the working of popular institutions. This occurred at Rome; and was one of the causes which brought the Republic to its death. It is a peril against which England has had, and may again have, to take precautions.

Changes in thought and belief operate on politics either by weakening the deferential and submissive habits of the classes which have been excluded from power so that they insist on having their fair share of it, or by implanting in the minds of the middle and upper classes new ideas which grow strong enough to make them insist on bringing old-fashioned practice into accord with new and more enlightened theory. It was the concurrence of these two forms of intellectual change that gave its specially destructive character to the French Revolution. Ideas of course act most quickly and powerfully when they are such as rouse emotion, for that which remains a mere intellectual concept or speculative opinion is not a thing to stir or to shake established institutions. The best illustration is to be found in religious beliefs. But the notion of Equality—that is to say, the notion that rights vested in every man as a man demand that every man shall be treated alike—has also proved an energetic explosive.

Influences of this kind counted for little at Rome. Neither have they, except in the form of religious beliefs, or when their force coincided with that exerted by religious convictions, become the source of strife or constitutional change in England.

One may indeed say that the course of England's political development has been less interrupted by convulsions than that of any other great State, for even the scars made by the Civil War were before long healed, so that hardly any of the old institutions perished, though some of them passed into new phases. The new buildings which popular government has within the present century added to the old edifice are built out of the same kind of stone, and (if one may venture to pursue the metaphor) weather to the same colour. So the growth of our law, both public and private, both criminal and civil, has been a gradual and quiet growth, due in the main to the steady increase in the magnitude and complexity of the industrial and commercial relations of life, which have made the law expand and improve at the bidding of practical needs. Where politics have affected the law, this has been through the rise of the humbler classes, a rise largely due to economic causes. So likewise the influence of ideas, of new views as to what law should be and how it should serve the community, has been marked by few sudden crises, and has been ruled by practical good sense rather than by aspirations after a theoretical perfection. As regards private law, this remark applies to the Romans also, although the constant strain placed upon their institutions by their territorial expansion as well as the differences between

a City State and a large rural State exposed their political system to more frequent shocks and ultimately to a more radical transformation.

Finally, it may be observed that the interest felt in law, and the amount of intellectual effort given to its development, was probably greater among the educated class in Rome than it has ever been in any large section of the English people. Romans of intellectual tastes had fewer things to think about, fewer subjects to attract or to distract them, than the English have had. Law was closely interwoven with public life. Country life and country sports, commerce, religion, travel and adventure, covered less of the mental horizon than these pursuits have covered to Englishmen of the upper or educated class, so that more of thought and time was left to be devoted to law. Nor were many Romans carried off into other regions, like the Greeks, by the love of art, or of music, or of abstract speculation.

From this reflection another arises, viz. that legal and constitutional studies, as a subject for research and thought, find the competition of other subjects more severe in England to-day than they did in the eighteenth century[1]. Historical inquiries, economic inquiries, and, to a still larger extent, inquiries in the realm of Nature, claim a far larger share in the interest of eager and active minds now than in the days of Hobbes or Locke or Bentham. They have done much to extrude law from the place it once held among subjects of interest to unprofessional persons. This is true all over the world; but legal topics, whether constitutional or belonging to the sphere of penal or administrative, or international or ordin-

[1] I owe this observation to my friend Mr. Dicey.

ary private law, seem now to claim even fewer votaries in England than they do in France or Germany, and certainly fewer than they do in the United States.

VI. Observations on France and Germany.

The sketch which I have sought to draw of the relations of general history to legal history might have been with advantage extended to include the legal history of other States, and particularly of two such important factors in modern civilization as France and Germany. But, apart from the undue length to which an essay would stretch if it tried to cover so large a field, there is a good reason why we may deem these two countries less well suited for the sort of comparative treatment here essayed. Neither of them has had the kind of independent and truly national legal development which belonged to Rome and belongs to England. Each of them started on its career with a body of pre-existing law, made elsewhere, viz. the Roman law which had come down to France and to Germany from antiquity. In Gaul, even in the parts most settled by the Franks, the law of the Empire held its ground, though everywhere largely modified by feudal land usages, and in the northern half of the country, when it had ceased to be Gaul and had become France, in the form of customs and not of written Roman texts. In Germany the old Teutonic customary law was by degrees (except as regards land rights) supplanted by the *Corpus Iuris* of Justinian, in conformity with the idea, fantastic as that idea now appears to us, which regarded the Roman Emperors from Julius Caesar down to Constantine the Sixth as the predecessors in title of the

Saxon and Franconian Emperors. Thus neither the French nor the Germans built up on their own national foundation a law distinctively their own. Moreover, both Germany and France stand contrasted with England as well as with Rome in the fact that neither country ever had a true central legislature or central system of law courts comparable with the Parliament and King's Courts of England. The German Diet, though enactments were occasionally made in it with its consent by the sovereign, enactments which however were not universally obeyed, dealt very little with law proper, even in the days of its greatest strength. Still less were the French States-General, even before their long eclipse, an effective legislature. Thus the development of the law of both Germany and France fell mainly into the hands of the jurists, qualified to some extent in Germany by the ordinances enacted by the electors, landgraves, and other princes, as well as by the free imper al cities, and (in later days) by the kings whose dominions formed part of the decaying Empire, and qualified in post-mediaeval France by the ordinances of the king. In both countries it was upon the Roman law, as modified by custom, that the jurists worked, and hence in neither did a body of law grow up which was truly national, in the sense either of having a distinctive national quality or of embracing the whole nation or of having been enacted by a national legislature. The first complete unity given to law in France was given by Napoleon. His Code was based on the Roman law theretofore used, which had to a considerable extent been already codified under Lewis XIV; yet the creation of one Code for the whole country was

a step so bold that it could hardly have been attempted except by an autocrat and on the morrow of a revolution. The first modern effort to give unity to law in Germany, itself an efflux of the aspiration for national unity, was made by the General Bills of Exchange Law (*Wechselordnung*) (1848–1850), while a general Commercial Code (*Gemeines Handelsgesetzbuch*) enacted in various States between 1862 and 1866 was re-enacted for the new Empire in 1871. The fuller unity long desired was attained in 1900, when the new general Code for the whole German Empire came into force. This similarity between the legal history of France and that of Germany seems the more curious when one remembers that, so far as mere political unity is concerned, France attained that unity comparatively early, one may say at the end of the fifteenth century, while Germany continued down till the extinction of the old Empire in 1806 to go on losing what political unity she had possessed. It was not till 1866 that she began to regain it, though the Customs Union of the German States, formed in 1829, had been a presage of what was coming.

VII. Private Law least affected by Political Changes or Direct Legislation.

One phenomenon is common to the legal history in all these nations. That part of the law which has the greatest interest for the scientific student, and the greatest importance for the ordinary citizen, the private civil law of family and property, of contracts and torts, has been the part least affected either by political changes or by direct legislation. It has been evolved quietly, slowly and almost imperceptibly, first by

popular custom, then by the labours of jurists and the practice of the Courts. Direct legislation by the supreme power has stepped in chiefly to settle controversies between conflicting authorities, or to expunge errors too firmly rooted for judges to rectify, or to embody existing usage in a definite and permanent form. In the sphere of private law, and even in that of criminal law (so far as not affected by politics), legislation scarcely ever creates any large new rule, and seldom even any minor rule which is absolutely new, not an enlargement of something which has gone before. Pure legislative novelties mostly turn out ill. Fortunately, the good sense of Englishmen, like that of Romans, has rarely permitted them to appear.

The parallel drawn between the history of Roman and that of English law is less instructive when we reach the later stages of that history. It cannot be made complete, not only because we know comparatively little of the inner condition and practical working of the Courts after the time of Constantine, but because there was after his time both a political and an intellectual decay, which few will profess to discover in the England of this century. The expansion and enrichment of the Roman system had stopped even before Constantine, while that of English Law is still proceeding[1]. In England commerce is still growing, education is still advancing, new and complicated pro-

[1] Within two centuries after Justinian's time official abridgements of his *Corpus Iuris* began to be issued, and it was virtually superseded in the end of the ninth century by the *Basilica* of the Emperor Leo the Philosopher. The action of his successors was largely directed to cutting down the old law into a shape better fitted for the changed conditions of the Empire, and the declining intelligence of the people.

blems are still emerging, so that many forces continue to work for the development of law. Though we cannot foresee what lines this development will follow we may feel sure that some of the old causes of change are disappearing. The democratization of political institutions seems nearly complete, religious passions have grown cold, and all classes have been so fully admitted to a share in political power that any such bold reforms in central and local administration, in procedure, in penal law, and in one or two departments of private civil law as followed the Reform Bill of 1832, seem improbable. In some departments the possibilities of further progress appear to be exhausted, though there are others, such as those concerned with questions of the right of combination among employers or among workmen, and the character which motive imparts to acts in themselves lawful on which the last word is far from having been said[1]. But there are at least two real difficulties which remain to be grappled with. One relates to the methods of legal proceedings. Their cost is so great as to deter many persons from the attempt to enforce just claims, to impose a heavy and unfair burden upon successful litigants, and to furnish opportunities for blackmail (especially in libel cases) to men who are equally devoid of money and of scruples. All efforts to cheapen them have so far failed. The other problem relates to a matter of substance. What are the general principles to be followed in empowering the State to regulate the conduct of individuals or groups of individuals, in permitting the

[1] The interest excited by cases such as those of the *Mogul Steamship Company* v. *Macgregor* and *Allen* v. *Flood* illustrates this.

central government or a local authority to compete with individuals in industrial enterprises, and in restricting the power of combinations formed for commercial or industrial objects? This group of problems are being daily pressed to the front by political forces on the one hand and by industrial progress on the other. They are as urgent in the United States as in Britain. Nor are they matters for legislation only, for cases frequently arise which the best legislation cannot count upon having provided for, and which it needs not only technical skill but also a philosophic grasp of principles on the part of the bar and bench to conduct to a solution. The experience of the ancient world and that of the Middle Ages throws little light upon them. But as they have appeared simultaneously in many modern nations, each may have something to learn from the others. Comparative jurisprudence has no more interesting field than this: nor is there any task in labouring on which an enlightened mind may find a wider scope for the devotion of learning and thought to the service of the community.

I am tempted to venture on some other predictions as to the influences that may be expected to work on the legal changes of the coming century. But we have been pursuing an historical, not a speculative, inquiry, and it will be enough to suggest that industry and commerce, as quickened by the progress of physical science, are likely to be factors of increasing power, and that the purely political element in the development of law will count for less than that contributed by the effort to readjust social conditions and to give effect to social aspirations.

XVI

MARRIAGE AND DIVORCE UNDER ROMAN AND ENGLISH LAW

I. Introductory.

In all communities that have risen out of the savage state, no legal institution is at once so universal, and also so fundamental, a part of their social system as is Marriage. None affects the inner life of a nation so profoundly, or in so many ways, ethical, social, and economic. None has appeared under more various forms, or been more often modified by law, when sentiment or religion prescribed a change. In a famous passage which has been constantly quoted, and often misunderstood, Ulpian takes marriage as the type of those legal relations which are prescribed by the Law of Nature, and extends that Law so far as to make it govern the irrational creatures as well as mankind [1]. If then the relation be so eminently natural, one might expect it to be also uniform. Yet it so happens that there is no relation with which custom and legislation have, in different peoples and at different times, dealt so differently. Nature must surely have spoken with a very uncertain voice when, as the jurist says, she 'taught this law to all animals.' Nor does this infinite diversity show signs of disappearing. While in most branches of law the progress of parallel development in various

[1] See Essay XI, p. 150.

civilized states is a progress towards uniformity, so that the commercial law, for instance, of the chief European countries and of the United States is, as respects nineteen-twentieths of its substance, practically identical, the laws of these same countries are, in what relates to the forms of contracting marriage, the effect of marriage upon property rights, the grounds for dissolving and modes of dissolving marriage, extremely different, and apparently likely to remain different. Even within the narrow limits of the United Kingdom, England and Scotland have each its own system. Ireland has a different law from England in respect of the mode of solemnization; while, as respects divorce, the divergence goes so far that grounds are recognized as sufficient for divorce in Scotland which are not admitted in England, while in Ireland a divorce, except by private Act of Parliament, cannot be obtained at all. And the efforts to assimilate these three diverse systems made by reformers during two or three generations have been followed by so little practical result that they have been of late years altogether dropped.

Out of the long and obscure and intricate history of the subject, and out of the many still unsolved problems it presents, I propose to select one subject for discussion, viz. the history of the Roman law of the marriage relation, as compared with the English law, and particularly with some of the later developments of English law in the United States. On the antiquities of the matter, and in particular on the interesting and difficult questions relating to primitive forms of marriage, and to the polyandry which is supposed to have marked the earlier life of many peoples, I shall not

attempt to touch. Neither can I do more than glance at the ecclesiastical history of the institution, important as the church has been in influencing civil enactments and moulding social sentiment.

To elucidate the Roman system, some few technical details must be given, but I shall confine myself to those which are needed in order to facilitate a comparison between it and that of England, and to show how essentially the later Roman conception of the relation differed from that which Christianity created in mediaeval Europe.

II. Character of Marriage in Early Law.

When clear light first breaks upon the ancient world round the Mediterranean Sea we find that the relation of the sexes exists in three forms. The most savage tribes, such as those which Herodotus saw or heard of in Libya and Scythia, have no regular marriage at all. Some lived in a kind of promiscuity; some were probably polyandrous. The Eastern peoples—Persians, Lydians, Babylonians, and so forth—are polygamous, as was Israel in the days of Moses and Solomon, though in a much lesser degree after the Captivity, and as was the Trojan Priam of the Homeric poems. The Western peoples, and especially the Greeks and the Italians, were, broadly speaking, monogamous, although concubinage superadded to lawful marriage, especially among the Greeks, was not unknown. The contrast of the East and the West was marked; and this particular difference was not only characteristic but momentous, since it presaged a different course for

the social development of the two regions[1]. So when the Teutonic and Celtic peoples came later on the stage, they too were generally monogamous, though among the heathen Celts the tie seems to have been somewhat looser than among the Teutons, and a plurality of wives may have been not uncommon in heathen times. Tacitus, while dwelling on the sanctity of German marriages, observes that occasionally the chieftains had more than one wife, owing to the wish of other families for alliance with them[2]. Polygamy slowly died out of the East under Roman rule, though possibly never quite extinguished, for we find prohibitions of it renewed by the Emperors down to Diocletian, before whose time all subjects had become citizens. It maintained itself in the Oriental court of the Sassanid kings of Persia, and was indeed one of the features of Persian life which most shocked the philosophers of the later Roman Empire. As there is no trace of it in the Roman law[3], it need not concern us further, since it has never, except in the singular instance of the Mormons, reappeared in any of the communities which have been regulated either by Roman or by Teutonic law[4].

Before describing the Roman system, let us note three general features which belong to the marriage customs, not indeed of all, but certainly of most peoples in the

[1] Euripides (*Androm.* vv. 173–180) contrasts the marriage usages of barbarians and Greeks, and dilates (cf. v. 465 sqq.) on the evils of polygamy.

[2] Tac. *Germ.* c. xvii.

[3] Although Julius Caesar, if we may credit Suetonius, caused a measure to be drafted for enabling him to marry as many wives as he liked for the sake of having legitimate issue (Suet. *Julius*, c. 52).

[4] Among the Jews it was (though forbidden by Roman law) not formally abolished till the tenth century.

earlier stages of civilization. They are worth noting, because they constitute the central threads of the history of the relation during civilized times.

1. The marriage tie has more or less of a religious or sacred character, being generally entered into with rites or ceremonies which place it under supernatural sanctions. This is, of course, more distinctly the case where monogamy prevails.

2. In the marriage relation the husband has a predominant position both as regards control over the person and conduct of the wife, and as regards property, whether that which was hers or that which was brought into common stock by her and by him.

3. The tie is comparatively easy of dissolution by the husband, less easily dissoluble by the wife. This is a natural consequence of the inferior position which she holds in early society.

Although these three features are generally characteristic of the earlier stages of family law, they are not universally present; and their presence or absence in any given community does not necessarily coincide with a lower or higher scale of civilization in that community. The temptation to generalize in these matters is natural, but it is dangerous. True as may seem the general proposition, that the higher or lower position of women in any society is a pretty good index to the progress that society has made, there are too many exceptions to the rule for us to take it as a point of departure for inquiry. Nor can these exceptions be always accounted for by any one cause, such as race or religion.

III. The Earlier Form of Roman Marriage Law.

Now let us come to the Romans, of whom we may say that it is they who have built up the marriage law of the civilized world, partly by their action as secular rulers in pagan times, partly by their action as priests in Christian times. The other modifying elements, and particularly the Hebrew and Teutonic influences, which have worked upon the marriage laws of Christendom, are of quite inferior moment.

Roman law begins with two phenomena which seem at first sight inconsistent. One is the complete subjection of the wife to the husband on the legal side, as regards both person and property. The other is her complete equality on the social and moral side, as regards her status and the respect paid to her.

In describing the nature of this subjection, one must make it clearly understood that, strictly speaking, it was not by the mere fact of marriage, that is to say, by the legal act necessary to constitute marriage, that a woman entered that position of absolute absorption into the legal personality of her husband which is so remarkable a feature of the old law. Whatever may have been the case in prehistoric times, we find that at the time when the Twelve Tables were enacted (B.C. 449) a marriage could be contracted without any forms or ceremonies whatever, by the sole consent of the parties; and that, where this was the case, the husband did not acquire any power over the wife, and the latter retained whatever property she previously possessed. It was therefore not marriage *per se* that created the power of the husband, for a woman might be legally married and not be under

the marital power. But although this 'free marriage,' as we may call it (the term is not Roman, but invented by modern jurists), was legally possible, the custom, and in old days the almost invariable custom, of the people was to add to the marriage a ceremony not essential to its validity as a marriage, but one which had important legal consequences. We may safely assume that there was originally no true marriage without the ceremony, but at the time of the Twelve Tables this was no longer the case. The ceremony created a relation which the Romans called Hand (*manus*), and brought the wife into her husband's power, putting her, so far as legal rights went, in the position of a daughter (*filiae loco*). It gave the husband all the property she had when she married. It entitled him to all she might acquire afterwards, whether by gift or by her own labour. It enabled him to command her labour, and even to sell her, though the sale neither extinguished the marriage nor made her a slave, but merely enabled the purchaser to make her work, while still requiring him to respect her personal rights[1]. In compensation for these disadvantages the wife became entitled to be supported by her husband, and to receive a share of his property at his death, as one of the 'family heirs' (*sui heredes*), whom he could disinherit only in a formal way. She had by coming under his Hand passed out of her original family, and lost all right by the strict civil law to share in the inheritance of her father.

There were two forms of ceremony by which this

[1] Some writers doubt whether this power of sale existed, and refer to a supposed 'law of Romulus' mentioned by Plutarch which devoted to the infernal gods whoever sold his wife. But the balance seems to incline in favour of the existence of the power.

power of the Hand could be created. One, probably the older, had a religious character. It took place in the presence of the chief pontiff, and its main feature was a sacrifice to Jupiter, with the eating by the bride and bridegroom of a cake of a particular kind of corn (*far*), whence it was called *confarreatio*. It was originally confined to members of the patrician houses. The other was a purely civil act, and consisted in the sale by the bride of herself, with the approval of her father or her guardian (as the case might be), to the bridegroom, apparently accompanied (though there is a controversy on this point) by a contemporaneous sale by the bridegroom of himself to the bride. The transaction was carried out with certain formal words and in the presence of five witnesses (being citizens)[1], besides the man who held the scales with which the money constituting the price was supposed to be weighed. The price was of course nominal, though it had in very early times been real.

These two forms have been frequently spoken of as if they were indispensable forms of marriage, so that marriage had always the Hand power as its consequence. But this, though it may probably have been the case in very early days, was not so in those historical times to which I must confine myself. And the proof of this may be found in the fact that if a woman was married without either of the above forms, she did not pass into the Hand of her husband unless or until she had lived with him for a year, and not even then if she had

[1] There has been much dispute as to this ceremony: I give what seems the most probable view. It may descend from a more ancient sale of the wife by her relatives to the husband, similar to that which we find in some primitive peoples.

absented herself from his house for three continuous nights during that year[1]. And where the Hand power had not been created, the property rights of the wife, whatever they were[2], remained unaffected by the marriage. The period of three nights is fixed in the Twelve Tables, possibly as a precise definition of a custom previously more uncertain.

This was the old Roman system, and a very singular system it was, because it placed side by side the extreme of marital control as the normal state of things and the complete absence of that control as a possible state of things. Doubtless the marriages with Hand were in early days practically universal, resting upon a sentiment and a social usage so strong that women themselves did not desire the free marriage, which would put them in an exceptional position, outside the legal family of the husband. Nor can we doubt that the wide power which the law gave to the husband was in point of fact restrained within narrow limits, not only by affection, but also by the vigilant public opinion of a comparatively small community.

IV. Change from the Earlier to the Later System at Rome.

Before the close of the republican period the rite of *confarreatio* practically died out, or was referred to as an old-world curiosity, much as a modern English lawyer might refer to the power of excommunication

[1] This was in pursuance of the general rule that rights over a movable were acquired by a year's continuous holding: 'usus auctoritas fundi biennium, caeterarum rerum annuus esto.'

[2] If she was in the power (*potestas*) of her father, she had no property of her own. If she was *sui iuris*, she was under guardianship.

possessed by ecclesiastical authorities. The patrician houses had become comparatively few, and the daughters of those that remained evidently did not wish to come under the Hand power[1]. The form of *coemptio*, which all citizens might use, lasted longer, and seems to have been not infrequently applied in Cicero's time. Two centuries later it also was vanishing, and Gaius tells us that the rule under which uninterrupted residence created the husband's power of Hand, and might be stopped by the wife's three nights' absence, had completely disappeared (Gai *Inst.* i. 111). So we may say broadly that from the time of Julius Caesar onwards the marriage without Hand had become the rule, while from the time of Hadrian onwards the legal acts that had usually accompanied marriage, which placed the wife under the husband's control, were almost obsolete.

This was a remarkable change. The Roman wife in the time of the Punic Wars had, with rare exceptions, been absolutely subject to her husband. She passed out of her original family, losing her rights of inheritance in it. Her husband acquired all her property. He could control her actions. He sat as judge over her, if she was accused of any offence, although custom required that a sort of council of his and her relatives should be summoned to advise him and to see fair play. He could put her to death if found guilty. He could (apparently) sell her into a condition practically equivalent to slavery,

[1] Nevertheless it was retained in a few families for the purpose of providing persons who could hold four great priestly offices, since by ancient usage none save those born from a marriage with confarreation were able to serve these priesthoods. But its operation seems to have been restricted by a decree of the senate so as to apply only so far as religious rites were concerned (*quoad sacra*) (Gai *Inst.* i. 136).

and could surrender her to a plaintiff who sued him in respect of any civil wrong she had committed, thereby ridding himself of liability. One can hardly imagine a more absolute subjection to one person of another person who was nevertheless not only free but respected and influential, as we know that the wife in old Rome was. It would be difficult to understand how such a system worked did we not know that manners and public opinion restrain the exercise of legal rights.

Such was the old practice. Under the new one, universal in the time of Domitian and Trajan, which is also the time of Tacitus, Juvenal and Martial, the Roman wife was absolutely independent of her husband, just as if she had remained unmarried. He had little or no legal power of constraint over her actions. Her property, that which came to her by gift or bequest as well as that which she earned, remained her own to all intents and for all purposes. She did not enter her husband's family, and acquired only a very limited right of intestate succession to his property.

This striking contrast may be explained by the fact that the disabilities which attached to the wife under the old system were not in legal strictness the consequence of marriage itself, but of legal acts which an almost universal sentiment and custom had attached to marriage, though in themselves acts distinct from it. A perfectly valid marriage could exist without these legal acts, and so far back as our authorities carry us, we find that a few, though probably originally only a very few, marriages did take place without them. Accordingly when sentiment changed, and custom no longer prescribed the use of confarreation or coemp-

tion, the power of Hand vanished of itself and vanished utterly. Had it been an essential part of the marriage ceremony, it would doubtless have been by degrees weakened in force and accommodated to the ideas of a new society. But no legislation was needed to emancipate the wife. The mere omission to apply one or other of the old concomitants gave the marriage relation all the freedom the parties could desire and perhaps more than was expedient for them.

We may now dismiss these ancient forms and address ourselves to the position of the wife under the normal marriage of later times—the so-called 'free marriage,' since this is the form in which the Roman institution descended to and has affected modern law [1].

V. Later Marriage Law: Personal Relation of the Consorts.

The following points deserve to be noted as characterizing the Roman view.

The act whereby marriage was contracted was a purely private act. No intervention of any State official, no registration or other public record of any sort was required. The two parties, and the two parties only, were deemed to be concerned [2].

[1] I pass by the distinction between *iustae nuptiae*, which could be contracted only between Roman citizens, and the so-called 'natural' marriage, or *matrimonium iuris gentium*, which was created by the marriage of a full citizen to a half citizen or an alien (*peregrinus*), because the latter is of no consequence for our purpose, and practically disappeared when all Roman subjects became citizens. It was a perfectly valid marriage, and the children were legitimate. As to their status, see Gai *Inst.* i. 78, 79.

[2] Where either party was subject to the paternal power of his or her father (or grandfather), the consent of the father (or grandfather) (or both) was required, though in a few specified cases it might be either dispensed

The act was a purely civil act, to which no religious or ecclesiastical rite was essential either in heathen or in Christian times. There were indeed what may be called decorative ceremonies, some of which we find mentioned in poems like the famous Epithalamium of Catullus, but they had no more to do with the legal nature and effect of the matter than has the throwing of old shoes or rice at a modern English wedding.

The act required no prescribed form. It consisted solely in the reciprocally expressed consent of the parties, which might be given in any words, or be subsequently presumed from facts. 'Marriage is contracted by consent only' (*nuptiae solo consensu contrahuntur*) is the invariable Roman maxim. Even the conducting of the bride to the bridegroom's house, which has sometimes been represented as necessary[1], seems to have been regarded rather as evidence needed in certain cases than as essential to the validity of the act[2]. A generally prevalent usage made a formal betrothal (*sponsalia*) precede the actual wedding. But the betrothal promise created no legal right. No action lay upon it, such as that which English and

with or compelled. This was a consequence of the Roman family system. It was irrespective of the age of bride or bridegroom.

[1] The Emperor Majorian (A. D. 455–461) is said to have issued a constitution for the Western Empire, making the creation of a *dos* essential to the validity of a marriage: but this provision, which can hardly have been intended to be general, seems to have never taken effect. The Western Empire was then in the throes of dissolution.

[2] See Paul., *Sent. Recept.* xix. 8; *Dig.* xxii. 2. 5. The suggestion which may be found in some modern writers that Marriage fell within the class of the contracts created by the delivery of an object (the so-called Real Contracts), has no Roman authority in its favour, and is indeed based on a misconception of the nature of those four contracts, in all of which the obligation created is for the restoring of the object delivered. Marriage is assuredly not a bailment.

Anglo-American law unfortunately allows to be brought for breach of promise of marriage. In early times formal and binding stipulations seem to have been often made on each side between the bridegroom and the father (or other male relative) of the bride for the giving and receiving of the bride; and if the promise were broken without sufficient cause, an action lay against the party in fault for the worth of the marriage[1]. This, however, disappeared. Under the influence of a more refined sentiment, not only could no promise of marriage be enforced, but if the parties made a contract whereby each bound him or herself to the other in a penal sum to become payable in case of breach, such a provision was held to be disgraceful (*pactum turpe*) as well as invalid. This was the law of later republican and imperial times. Betrothal had, however, some legal effects. It entitled either of the betrothed parties to bring an action for an injury (of an insulting nature) offered to the other. It rendered any one infamous who being betrothed to one person contracted betrothal to another. It entitled either party, if the espousal was broken off before marriage, to reclaim whatever gifts he or she might have bestowed upon the other.

As regards personal status, the wife acquired that of her husband (unless either had been formerly a slave), and his domicil became hers. In the old days of Hand power she had taken the name of his *gens*, but now she retained her own, besides her personal 'first name' (*praenomen*) (*e.g.* Tertia)[2]. Each spouse being interested

[1] This was at any rate a usage among the Latins; but how far in Rome seems doubtful.

[2] Under the Empire we usually find women using two names, from their father's *gens* and family (e.g. *Caecilia Metella*). Sometimes, it would seem,

in the character and reputation of the other, he could sue for damages if any insult was offered to her, she for insult to him. He is bound to support her in a manner suitable to their rank, whatever her private means may be. Though each can bring an action against the other, the action must not be one which affects personal credit and honour (*actio infamans*), and hence, though each has his and her own property, neither can proceed against the other by a civil action of theft, even if the property seized was seized in contemplation of a divorce [1]. It need hardly be added that if the wife's father, or grandfather, were living, she would remain, unless she had been emancipated, subject to the paternal power, being for all legal purposes a member of her original family and not of her husband's. But the person in whose power she is cannot (at least in imperial days) take her away from her husband. Antoninus Pius forbade a happy marriage to be disturbed by a father; and in the third century (perhaps earlier) the husband could proceed by way of interdict to compel a father to restore his wife to him [2].

VI. Later Law. Pecuniary Relations of the Consorts.

This curiously detached position of the two consorts expressed itself in their pecuniary relations. Each had complete disposal of his or her property by will

the name of the father's *gens* was followed by one taken from the mother (e. g. *Iunia Lepida*, *Annaea Faustina*). The subject is fully discussed by Mommsen, in his *Römisches Staatsrecht*.

[1] A special action (*rerum amotarum*) was given in this case. Some jurists held that the joint enjoyment of household goods made the conception of Theft inapplicable to a wife's dealings, however unauthorized, with her husband's property. *Dig.* xxv. 2. 1.

[2] *Dig.* xliii. 30. 2.

as well as during life, though the wife needed, down to a comparatively late time, the authority of her guardian[1]. Neither had originally any right of succession to the other in case of intestacy, nor had the wife any right of intestate succession to her children nor they to her, except that which the Praetor gave them among the blood relatives (*cognati*) generally, after the agnates (persons related through males). A state of things so inconsistent with natural feeling could not however always continue, so the Praetor created a rule of practice whereby each consort had a reciprocal right of succession to the other. But even in doing so, he placed this succession after that of other blood relations, as far as the children of second cousins. This postponement of a consort to blood relatives was carried even further by Justinian's legislation, for that emperor extended the category of relatives who could succeed in case of intestacy, and made no provision for the wife (beyond that which the Praetor had made), except to some small degree in case of a necessitous widow. The relationship of mother and child received a somewhat fuller recognition, for laws (*Senatus Consultum Tertullianum*, *Sc. Orphitianum*) of the time of Hadrian and Marcus Aurelius gave the mother and the children reciprocal rights of inheritance[2], which, finding a place in the general scheme of succession based on consanguinity which Justinian established, have passed into modern law.

[1] The guardianship of women of full age seems to have died out after women received power to select a guardian for themselves, a change which of course made his action purely formal.

[2] The mother's succession was originally granted only where she had borne three children (if a freed-woman, four).

Distinct as were the personalities of the two consorts in respect of property, the practical needs of a joint life recommended some plan under which a provision might be made for the expenses of a joint household. This sprang up as soon as marriages without the concomitant creation of the Hand power had grown common. It became usual for the wife to bring with her land or goods, either her own, if she were independent, or bestowed by her father or other relative. This property, which was destined for the support of the married pair and their children, was called the *Dos*, a term which, since it denotes the wife's contribution to the matrimonial fund, must not be translated by our English word Dower, for that term describes the right of a wife who survives her husband to have a share in his landed estate. Many rules sprang up regarding the *Dos*, rules probably due in the first instance to custom, for as the instruments of marriage contracts were usually drawn on pretty uniform lines, these lines ultimately became settled law [1]. The general principle came to be that property given from the wife's side, whether by her father, or by herself, or by some of her relatives, became subject to the husband's right of user while the marriage lasted, as enabling him to fulfil his obligation to support wife and children, but at the expiry of the marriage by the death (natural or civil) of either party, or by divorce, reverted to the wife or her heirs [2]. If, however, the property had been

[1] The 'custom of conveyancers' has worked itself into English law in a somewhat similar way.

[2] This was the rule as settled by Justinian. Before his time, the husband took the *Dos* at the wife's death unless it had been given by her father.

given by the wife's father, he might, if still living, reclaim it [1]. The *Dos* is said by the Romans to be given for the purpose of supporting the burden of married housekeeping, and therefore the administration and usufruct of it pertain to the husband, while the ultimate ownership remains in the wife, or in the father who constituted it, as the case may be. In the later imperial period a sort of second form of matrimonial property was introduced, called the gift for the sake of marriage (*donatio propter nuptias*). It was made by the husband, and remained his property both during and after the marriage. So far, as it was only theoretically separated from other parts of the husband's estate, it might seem to have no importance. But if he became insolvent, it did not, like the rest of his property, pass to his creditors, but went over to the wife, just as the *Dos*, although administered by the husband, remained unaffected by his insolvency. And just as the husband was entitled, where a divorce was caused by the wife's fault, to retain a part of the *Dos*, so if a divorce was caused by the husband's fault, the *donatio propter nuptias*, or a part of it, might be claimed by the injured wife. The similarity of some of these arrangements to the practice of English marriage settlements will occur to every one's mind, though in England settlements are always created and governed by the provisions of the deeds which create them, whereas in Rome, although special provisions were frequently resorted to, there arose a

[1] There are many less important rules regarding the extent of the husband's interest and the form in which the property is to be restored at the end of the marriage, which it is not necessary to set forth, as they do not affect the general principle. Indeed generally through these pages I am forced, for the sake of clearness and brevity, to omit a number of minor provisions.

general legal doctrine whose provisions were applicable to gifts made upon or in contemplation of marriage.

One further point needs to be mentioned. It was a very old customary (or, as we should say, common law) rule of Roman law that neither of the wedded pair could during the marriage bestow gifts upon the other, the reason assigned being the risk that one or other might by the exercise of the influence arising from their relation be deprived of his or her property to his or her permanent damage (*ne mutuato amore invicem spoliarentur*). This principle, which protects the wife from being either wheedled or bullied out of her separate property, and may be compared with the English restraint on alienation or anticipation applied to a wife's settled property, was also held to be occasionally needed to protect the husband's interests, and those of the children, from suffering at the hands of a grasping wife. It issues from the view which the Roman jurists enounce that affection must not be abused so as to obtain pecuniary gain; and one jurist adds that if either party were permitted to make gifts the omission to make them might lead to the dissolution of the marriage, and so the continuance of marriages would be purchasable[1]. Such gifts were accordingly held null and void, the only exception being that where property actually given had been left in the donee's hands until the donor's death, the heir of the donor could not reclaim it from the surviving donee. Need-

[1] 'Sextus Caecilius et illam causam adiciebat, quia saepe futurum esset ut discuterentur matrimonia si non donaret is qui posset atque ea ratione eventurum ut venalicia essent matrimonia.' This view was sanctioned by the Emperor Caracalla in his speech to the senate, which introduced the exception next mentioned in the text; *Dig.* xxiv. 1. 2.

less to say that the rule only covered serious transfers of property, and did not apply to gifts of dress or ornaments or such other tokens of affection as may from time to time pass between happy consorts.

VII. General Character of the Roman Conception of Marriage.

Reviewing the rules which regulated marriage without the Hand Power, the sole marriage of the classical times of Roman law, we are struck by three things.

The conception of the marriage relation is an altogether high and worthy one. A great jurist defines it as a partnership in the whole of life, a sharing of rights both sacred and secular[1]. The wife is the husband's equal[2]. She has full control of her daily life and her property. She is not shut up, like the Greek wife, especially among the Ionians, in a sort of Oriental seclusion, but moves freely about the city, not only mistress of her home, but also claiming and receiving public respect, though so far placed on a different footing from men, and judged by a standard more rigid than ours, that it was deemed unbecoming for her to dance and shocking for her to drink wine.

The marriage relation is deemed to be wholly a matter of private concern with which neither the State nor (in Christian times) the Church has to concern itself. This was so far modified under the Emperors, that the State, from the time of Augustus, began to

[1] 'Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio;' Modestinus in *Dig.* xxiii. 2. 1.

[2] This was expressed in the phrase which the bride anciently used when brought to the husband's house: 'Ubi tu Gaius, ego Gaia.'

try to discourage celibacy and childlessness in the interests of the maintenance of an upper class Roman population, as opposed to one recruited from freed men and strangers. But these efforts were not, as we shall see, incompatible with adherence to the general principle that the formation and dissolution of the tie required no State intervention, nor even any form prescribed by State authority.

The marriage relation rests entirely on the free will of the two parties[1]. If either having promised to enter it refuses to do so, no liability is incurred If either desires to quit it, he or she can do so. Within it, each retains his or her absolute freedom of action, absolute disposal of his or her property.

Compulsion in any form or guise is utterly opposed to a connexion which springs from free choice and is sustained by affection only.

These principles have a special interest as being the latest word of ancient civilization before Christianity began to influence legislation. They have in them much that is elevated, much that is attractive. They embody the doctrines which, after an interval of many centuries, have again begun to be preached with the fervour of conviction to the modern world, especially in England and the United States, by many zealous friends of progress, and especially by those who think that the greatest step towards progress is to be found in what is called the emancipation of woman.

[1] 'Libera matrimonia esse antiquitus placuit,' says the Emperor Severus Alexander in the third century. *Cod.* viii. 38. 2.

VIII. Divorce in Roman Law.

Let us now see how the Roman principles aforesaid worked out in practice as regards domestic morality and the structure of society, that structure depending for its health and its strength upon the purity of home life at least as much as it does upon any other factor.

The last of the above-stated three principles is the derivation of all the attributes of the marriage relation from the uncontrolled free will of the parties. This principle is applied to the continuance of the relation itself. With us moderns the tie is a permanent tie, which, though freely formed, cannot be freely dissolved, whether by one of the parties or by both. Very different was the Roman view. To them it is even less binding than an ordinary business contract. Take for instance a bargain made between *A* and *B* for the sale and purchase of a house. Such a bargain creates what the Romans call an obligation, a bond of law (*vinculum iuris*) which enables either of the contracting parties to require the other to fulfil his promise, or to pay damages in case of default. In Roman law the act of entering into marriage creates no such bond. The business contract can be rescinded only by the consent of both the parties to it. The marriage relation can be terminated by the will of one only. Each party in forming it promised only that he, or she, would remain united to the other so long as he, or she, desired so to remain united. This is the logical consequence of the principle that marriages should be free; this was how the Romans understood that principle.

Accordingly divorce can be effected by either party

at his or her pleasure, the doctrine of equality between the sexes being impartially applied, so that the wife may just as freely and easily divorce her husband as the husband may divorce his wife.

The early history of the matter is somewhat obscure, and need not detain us. It would seem probable that in the old days when marriage was accompanied by the Hand power, a husband might put away his wife if she had been convicted before the domestic council of certain grave offences[1]; and we gather that in such cases she was entitled to demand her emancipation, *i.e.* the extinction of the Hand power, by the proper legal method thereto appointed. Such cases were, however, extremely rare. When marriage unaccompanied by Hand power became frequent, we do not at first hear of any divorces. Our authorities declare that the first instance of divorce at Rome (they probably mean the first where no crime was alleged) was furnished by a certain Spurius Carvilius Ruga, who in B.C. 231 got rid of his wife, although warmly attached to her, on account of her sterility. Universal displeasure fell upon him for his conduct: and when L. Antonius put away his wife without summoning a council of friends and laying the matter before them, the Censors removed him from his tribe. But before long other husbands were found to imitate Spurius Carvilius. In the second century B.C. divorce was no longer rare. In the days of Julius Caesar it had

[1] A so-called 'law of Romulus' is said to have enumerated poisoning the children, adultery, and the use of false keys as grounds justifying the husband in divorcing his wife, no parallel right being granted to her. And there seems to have been a provision regarding divorce in the Twelve Tables.

become common, and continued to be so for many generations. The fragrance of religious sentiment had ceased to hallow marriage, and in the general decline of morals and manners it was one of the first institutions to suffer degradation. Not only Cn. Pompey, but such austere moralists as Cato the younger and the philosophic Cicero put away their wives: Cato his after thirty years of wedded life, Cicero two in rapid succession.

How far this decline had gone, even before the days of Cato and Cicero, appears from the singular speech delivered by Q. Caecilius Metellus, Censor in B.C. 131, in which he recommended a law for compelling everybody to marry, observing that if it were possible to have no wives at all, everybody would gladly escape that annoyance, but since nature had so ordained that it was not possible to live agreeably with them, nor to live at all without them, regard must be had rather to permanent welfare than to transitory pleasure[1]. We are told that both men and women, especially rich women, were constantly changing their consorts, on the most frivolous pretexts, or perhaps not caring to allege any pretext beyond their own caprice. Nothing more than a declaration of the will of the divorcing party was needed: and this was usually given by the husband in the set form of words, 'keep thy

[1] 'Si sine uxore, Quirites, possemus esse, omnes ea molestia careremus, sed quoniam ita natura tradidit ut neque cum illis commode nec sine illis ullo modo vivi possit, saluti perpetuae potius quam brevi voluptati consulendum.' Aul. Gell. *Noct. Att.* i. 6: cf. Liv. *Epit.* Book lix, and Sueton. *Vit. Aug.* Augustus, according to Gellius and Suetonius, caused this speech, delivered a century before, to be read aloud in the Senate in support of his bill *De Maritandis Ordinibus*, as being one which might fitly have been made for their own times.

property to thyself' (*tuas res tibi habeto*). Little or no social stigma seems to have attached to the divorcing partner, even to the wife, for public opinion, in older days a rigid guardian of hearth and home, had now, in a rich, luxurious, and corrupt society, a society which treated amusement as the main business of life, come to be callously tolerant. There were still pure and happy marriages, like that of Cn. Julius Agricola (the conqueror of Britain) and Flavia Domitilla; nor is it necessary to suppose that conjugal infidelity was the chief cause why unions were so lightly contracted and dissolved, for the mere whims of self-indulgent sybarites account for a great deal[1]. Still the main facts—the prevalence of divorce, the absence of social penalties, and the general profligacy of the wealthier classes—admit of no doubt.

The Emperor Augustus, though by no means himself a pattern of morality, was so much alarmed at a laxity of manners which threatened the well-being of the community, as to try to restrict divorces by requiring the party desiring to separate to declare his or her intent in the presence of seven witnesses, being all full Roman citizens. This rule, enacted by the *lex Iulia de adulteriis*, and continued down till Justinian's time, does not seem to have reduced the frequency of divorces, though it would tend to render the fact more certain in each case by providing indubitable evidence. Martial and Juvenal present a highly coloured yet perhaps not greatly exaggerated picture of the license of their time; and Seneca truly observes that when vice has become

[1] 'Aut minus aut certe non plus tricesima lux est
Et nubit decimo iam Thelesina viro.' Mart. vi. 7.

embodied in manners, remedies avail nothing (*Desinit esse remedio locus ubi quae fuerant vitia mores sunt*).

IX. Influence of Christianity on the Roman Divorce Law.

But a force had come into existence which was to prove itself far more powerful than the legislation of Augustus and his successors. The last thing that these monarchs looked for was a reformation emanating from a sect which they were persecuting, and from doctrines which their philosophers regarded with contempt. Christianity from the first recognized the sanctity of marriage, and when it became dominant (though for a long time by no means omnipotent) in the empire a new era began. The heathen emperors might probably have been glad to check the power of capriciously terminating a marriage, but public opinion, which clung to the principle of freedom, would have been too strong for them. All they did was to impose pecuniary penalties on the culpable party by entitling the husband to retain one-sixth of the *Dos* in case of the wife's infidelity, one-eighth if her faults had been slighter, to which, if there were children, one-sixth was added in respect of each child, but so as not to exceed one-half in all. (The custody of the children belonged to the father in respect of his paternal power.) If the husband was the guilty party, he was obliged to restore the *Dos* at once, instead of being allowed a year's grace.

Constantine and his successors had a somewhat easier task, because the Church had during several generations given to marriage a religious character, surrounded its celebration with many rites, and pro-

nounced her benediction upon those who entered into it. A new sentiment which looked on it as a union permanent because hallowed was growing up, and must have to some extent affected even heathen society, which remained for a century after Constantine both large and influential. Nevertheless, even the Christian emperors did not venture to forbid divorce. They heightened the pecuniary penalties on the party to blame for a separation by providing that where the misconduct of the wife gave the husband good grounds for divorcing her, she should lose the whole of the *Dos*, and where it was the husband's transgressions that justified the wife in leaving him, he should forfeit to her the property he had settled, the *donatio propter nuptias*. In both these cases the ultimate ownership of these two pieces of marriage property was reserved to the children, if any, the husband or wife, as the case might be, taking the usufruct or life interest. If there was no *Dos* or *Donatio*, then the culpable party forfeited to the innocent one a fourth part of his or her private property. The definition of misconduct included a frivolous divorce, so that capricious dissolutions were in this way discouraged.

If there were no fault on either side, but one or other partner desired to put an end to the marriage for the sake of entering a convent, or because the husband had been for five years in foreign captivity[1], or because there had never been any prospect of offspring, such a divorce was allowed, and carried no pecuniary penalty with it. It was called *divortium bona gratia*.

[1] The older doctrine had been that foreign captivity destroyed marriage *ipso facto*.

Finally, if both the parties agreed of their own free wills to separate—the *divortium communi consensu*—they might do so without assigning any cause or incurring any liability. This rule, which prevailed from first to last, and is recognized even in the Digest and Code of Justinian, was only once broken in upon. In an ordinance issued by Justinian in his later years (*Novella Constitutio* cxxxiv) the pious austerity of the reformer broke out so vehemently as to enact that where husband and wife agreed to divorce one another without sufficient ground, both should be incapable of remarriage and be immured for life in a convent, two-thirds of their property going to their children. Even then, however, the emperor did not venture to pronounce the divorce legally invalid. The will of the parties prevails, and they die unmarried, though they die in prison. This violation of the established doctrine was, however, too gross to stand. It excited general displeasure, and was repealed by Justin the Second, the nephew and successor of Justinian. So the divorce by consent lasted for some centuries longer, till in an age which had forgotten the ancient Roman ideas and was pervaded by the conception of the marriage relation which religion had instilled, the Emperor Leo the Philosopher declared this form of separation to be invalid.

Through the whole of this legislation on the subject of divorce, which is far more minute and intricate than the briefness of the outline here presented can convey, it is to be noted that the Romans held fast to two principles. One was the wholly private, the other the wholly secular, character of wedlock. There is no

legal method prescribed for entering into a marriage, nor any public record kept of marriages. There is no suit for divorce, no public registration of divorce. The State is not invoked in any way. Neither is the Church. Powerful as she had grown before Justinian's time, even that sovereign does not think of requiring her sanction to the extinction of the marriage which in most cases she had blessed. Either party has an absolute right to shake off the bond which has become a fetter. He or she may suffer pecuniarily by doing so, but the act itself is valid, valid against an innocent no less than against a guilty partner, and valid to the extent of permitting remarriage, except (as observed in the last paragraph) for a few years at the end of Justinian's reign.

Religion had consecrated the patrician marriage with the sacred cake in early days, and there had been a public character in the so-called plebeian marriage with the scales and five witnesses. But the marriage of the Christian Empire was (so far as law went) absolutely secular and absolutely private.

X. Some other Features of Roman Marriage Law.

Before leaving this part of the subject, a few minor curiosities of the Roman marriage law deserve to be mentioned. From the time of Augustus there were in force, during some centuries, various provisions [1] designed to promote marriage and the bearing of children by attaching certain burdens or disabilities to the un-

[1] Especially those contained in the *lex Iulia et Papia Poppaea*.

married and childless. Most of these, being opposed to the new sentiment which Christianity fostered, were swept away by the Emperor Constantine and his successors. Others fell into desuetude, so that before Justinian's time few and slight traces were left of statutes that had exerted a great influence in earlier days, though it may be doubted whether they did much to promote morality. The tendency of Christian teaching rather was in favour of celibacy, when adhered to from ascetic motives; and the passion for a monastic life which marked the end of the fourth century told powerfully in this direction, especially in the eastern half of the empire.

Similar sentiments worked to discourage second marriages, which earlier legislation had favoured, though the widow who remarried within the year of mourning (originally of ten, ultimately of twelve months) suffered infamy, by a very ancient custom, as did the person who wedded her. The marriage was, however, valid. The Christian emperors punished the consort who married again by debarring him or her from the full ownership of any property which came to him or her through the first marriage (*lucra nuptialia*), while leaving him (or her) the usufruct in it. But this applied only where there were children of the first marriage living, and was mainly prompted by a desire to protect their interests against a step-parent. The ancient world was singularly suspicious of step-mothers.

The rules with regard to prohibited degrees of matrimony varied widely from age to age. In early Rome even second cousins were forbidden to intermarry. There was in those days a usage permitting

near relatives, as far as second cousins, to kiss one another without incurring censure (*ius osculi*). Plutarch oddly explains the permission as grounded upon the right of the male relatives to satisfy themselves in this way that the ladies of the family had not tasted wine. But obviously the wholesome habits of a simple society allowed a familiar intercourse among kinsfolk just as far, and no farther, as the prohibition of marriage between them extended[1]. Towards the end of the republican period, however, we find that even first cousins might marry, probably by custom, for we hear of no specific enactments. Tacitus (*Ann.* xii. 6) refers to the practice as well established. This freedom lasted till the Emperor Theodosius the First, who forbade their marriage under pain of death by burning. Though the penalty was subsequently reduced, marriages of first cousins continued to be forbidden and punishable in the western half of the empire, while in the eastern they were made permissible, and remain so in the system of Justinian. The marriage of uncle or aunt with niece or nephew had been prohibited, though apparently by no statute, until the Emperor Claudius, desiring to marry his brother's daughter Agrippina, obtained a decree of the Senate declaring such a marriage legal[2]. So it remained for a time, though the marriage of an uncle with a sister's daughter, or of an aunt with a nephew, was still deemed incestuous. Christianity brought a change, and the law

[1] It is a curious instance of the variance of custom in this respect, that after it had in England become unusual for cousins of different sexes to kiss one another, the practice remained common in the simpler society of Scotland and still more in that of Ireland.

[2] Tac. *Ann.* xii. 5–7.

of Claudius was annulled by the sons of the Emperor Constantine. It was also by these sovereigns that marriage with a deceased wife's sister, or a deceased husband's brother, which had previously been lawful, though apparently regarded with social disapproval, was expressly forbidden [1]. This rule was adopted by Justinian, in whose *Codex* it finds a place [2].

Besides the full lawful marriage of Roman citizens, to which alone the previous remarks have referred, there were two other recognized relations of the sexes under the Roman law [3]. One of these was the marriage of a citizen, whether male or female, with a non-citizen, *i.e.* a person who did not enjoy that part of citizenship which covered family rights and was called *connubium*. This was called a natural marriage (*matrimonium naturale*, *matrimonium iuris gentium*) as existing under the Law of Nature or Law of the Nations (*ius gentium*), as contradistinguished from the peculiar law of Rome (*ius civile*) [4]. It was a perfectly legal union, and the children were legitimate: as of course were the children of two non-citizens who married according to their own law. When Roman citizenship became extended to all the subjects of the empire, the importance of this kind of marriage vanished, for it could thereafter have been applicable (with some few

[1] Many other prohibitions of marriages applying to persons holding official relations, or to persons of widely different rank, or to cases where adoptive relationships come in, need not be mentioned, as they have no longer any great interest.

[2] *Cod. Theod.* iii. 12, 2 sqq.; *Cod. Iustin.* v. 5. 5 and 8.

[3] The connexion of two slaves, called *contubernium*, was not deemed a legal relation at all, and children born from it were not legitimate. So also a free person could not legally intermarry with a slave.

[4] See Essay XI, p. 128.

exceptions) only to persons outside the Empire, and marriages with such persons, who were *prima facie* enemies, were forbidden.

The other relation was that called concubinage (*concubinatus*). It was something to which we have no precise analogue in modern law, for, so far from being prohibited by the law, it was regulated thereby, being treated as a lawful connexion. It is almost a sort of unequal marriage (and is practically so described by some of the jurists) existing between persons of different station—the man of superior rank, the woman of a rank so much inferior that it is not to be presumed that his union with her was intended to be a marriage. It leaves the woman in the same station in which it found her, not raising her, as marriage normally does, to the husband's level. The children born in such a union are not legitimate; but they may require their father to support them, and are even allowed by Justinian, in one of his later enactments (*Novella* lxxxix), a qualified right of intestate succession to him. They of course follow their mother's condition, and they have a right of inheriting her property. Even here the monogamic principle holds good. A man who is married cannot have a concubine, nor can any man have more than one concubine at a time. Though regarded with less indulgence by the Christian emperors than it had been by their predecessors, it held its ground in the Eastern Empire, even under Justinian, who calls it a 'permitted connexion' (*licita consuetudo*), and was not abolished till long after his time by the Emperor Leo the Philosopher in A.D. 887. In the West it became by degrees discredited, yet doubtless

had some influence on the practice of the clergy, the less strict of whom continued to maintain irregular matrimonial relations for a great while after celibacy had begun to be enforced by ecclesiastical authority.

Children born in concubinage may be legitimated by the subsequent marriage of their parents, according to a rule first introduced by Constantine, and subsequently enlarged and made permanent by Justinian (*Cod.* v. 27, 5 and 6; *Nov.* xii. 4; *Nov.* lxxxix. 8); a rule of great importance, which was long afterwards introduced into the Canon Law by Pope Alexander III in A.D. 1160, and has held its ground in the modern Roman law of continental Europe, as it does in the law of Scotland to this day. The bishops, prompted by the canonists, tried to introduce it in England, but were defeated by the opposition of the barons, who at the great council held at Merton in 20 Henry III (A.D. 1235-6) refused their consent in the famous words, 'We will not change the laws of England which hitherto have been used and approved[1].' Nevertheless such power of legitimating the children of a couple born before their legal marriage seems to have been part of the ancient customs of England before the Conquest. The children were at the wedding placed under a cloak which was spread

[1] 'Ad breve Regis de bastardia utrum aliquis natus ante matrimonium habere poterit hereditatem sicut ille qui natus est post. Responderunt omnes Episcopi quod nolunt nec possunt ad istud respondere, quia hoc esset contra communem formam Ecclesie. Ac rogaverunt omnes Episcopi Magnates ut consentirent quod nati ante matrimonium essent legitimi sicut illi qui nati sunt post matrimonium quantum ad successionem hereditariam quia Ecclesia tales habet pro legitimis; et omnes comites et barones una voce responderunt quod nolunt leges Anglie mutare que usitatate sunt et approbate.' 20 Henr. III, *Stat. Mert.*

over the parents, and were from this called in Germany, France, and Normandy, 'mantle children[1].'

I have already dwelt upon the most striking feature of the branch of legal history we have been tracing, the comparatively sudden passage from a system of extreme strictness—under which the wife's personality, with her whole right of property, became absolutely merged in that of her husband—to a system in which the two personalities remained quite distinct, united only by the rights which each had in matrimonial property, rights which were however not rights of joint-management, but exerciseable (subject to limitations) by the husband alone so long as the marriage lasted, while the reversion was secured to the wife or her relatives. It is hardly less noteworthy that these two contrasted systems did for a considerable time exist side by side; and for a century, or perhaps more, must both have been in full vigour, though the freer system was obviously gaining ground upon the older and more stringent one.

Another fact, though more easily explicable, is also worth noting. In its earlier stages the Roman marriage bore a religious character, for we can hardly doubt that in primitive times Confarreation, the old patrician form with the sacrifice and the holy cake, was practically universal among the original citizens, before the *plebs* came into a separate and legally recognized existence. Hence perhaps it is that marriage is described, even when that description had ceased to have the old meaning, as a 'sharing of all rights, both religious and

[1] Pollock and Maitland, vol. ii. p. 397. I have heard of the cloak custom as existing in Scotland down almost to our own time.

secular.' In its middle period, which covers some five centuries, it was a purely civil relation, not affected, in its legal aspects, by any rules attributable to a theological or superstitious source. But when Christianity became the dominant faith of the Empire, the view which the Gospel and the usages as well as the teaching of the Church had instilled began thenceforward to influence legislation. These usages did not indeed, down till the eighth century, transform the fundamental conception of marriage as a tie formed solely by consent, and needing the intervention neither of State nor of Church. But they worked themselves into the doctrines of the Church in such wise that, in later days, they succeeded in making matrimony so far a sacred relation as to give it an indissoluble character, and not only restricted the circle of persons between whom it could lawfully be contracted, but abolished the power of terminating it by the mere will of the parties.

XI. Marriage under the Canon Law.

When direct legislation by the State came to an end in Western Europe with the disappearance of the effective power of the Emperors in the fifth and sixth centuries, the control of marriage began to fall into the hands of the Church and remained there for many generations. To pass from the civil law of Rome to the ecclesiastical law of the Dark and Middle Ages is like quitting an open country, intersected by good roads, for a tract of mountain and forest where rough and tortuous paths furnish the only means of transit. It would be impossible within the limits of this Essay

to describe that law, which is copious, and embarrassed by not a few controverted points. All that it seems necessary to say here is that the Canon Law, which was collected and codified in the thirteenth and fourteenth centuries, so far adhered to the established Roman doctrine as to recognize, down till the Council of Trent, the main principle that marriage requires nothing more than the free consent of the parties, expressed in any way sufficient to show that the union which they contemplate is to be a permanent and lawful union. Marriage no doubt became, in the view of the mediaeval Church, as of the Roman Church to-day, a sacrament, but it is a sacrament which the parties can enter into without the aid of a priest. Their consent ought, no doubt, in the view of the Church and of Canon law, to be declared before the priest and to receive his benediction. It is only marriages 'in the face of the Church' that are deemed 'regular' marriages [1], and the Fourth Lateran Council under Innocent the Third directed the publication of banns. But the irregular marriage is nevertheless perfectly valid. It is indissoluble (subject as hereinafter mentioned), and the children born in it are legitimate. A good ground for this indulgence may be found not only in Roman traditions, but also in the fact that the Church was anxious to keep people out of sin and to make children legitimate, so that it always presumed everything it could in favour of lawful matrimony.

This view prevailed, and may be said to have been

[1] See Lord Stowell's famous judgement in *Lindo* v. *Belisario* (*Consist. Cases*, p. 230), where he examines in an interesting way the requisites of marriage under the 'law of nature.'

the common law of Christendom, as it had been of the old Roman Empire, down till the Council of Trent[1]. That assembly, against the strong protests of some of its members, passed a decree (Sessio XXIV, cap. i, *De Reformatione Matrimonii*) which, after reciting that clandestine marriages had been held valid, though blameworthy, declared that for the future all should be deemed invalid unless they took place in the presence of a priest and of two or three witnesses. Apparently it was not so much for the sake of securing the blessing of the Church upon every marriage as in order to prevent the scandals which had arisen from the breach of a tie contracted in secret that the change, a grave and memorable change, was made. This great Council, which was intended to secure the union of Christendom under the See of Rome, really contributed to intensify the separatist forces then at work: and from it onwards one can no longer speak of a general marriage law even for Western Europe. Custom and legislation took thenceforward different courses, not only as between Protestant and Roman Catholic nations, but even as between different Protestant nations, there being no common ecclesiastical authority which Protestant States recognized. Thus the era of the Reformation is an era as marked in the history of marriage law as was the era of Constantine, when Christianity began to be dominant in the Roman Empire. And we shall see, when we return to the subject of divorce, that this is even more strikingly the case as regards the dissolu-

[1] Canon VII of Session XXIV anathematizes those who deny the teaching of the Church that the adultery of one spouse does not dissolve the *vinculum matrimonii*, and Canon X those who deny that it is better and happier to remain in a state of virginity or celibacy.

bility of marriage than as regards the mode of contracting it.

Before passing on to sketch the legal history of the institution in England—since it is impossible to find space here for an account of its treatment in the laws of other European States—it is well to note what had been the general tendency of the customary law of the Middle Ages upon the character of the marriage relation.

One may sum up that tendency by saying that it had virtually expunged the free and simple marriage of the Romans under the later Republic and the Empire, and had substituted for it a system more closely resembling that of the religious marriage with Hand power of early Rome. The ceremony had practically become a religious one, though till the Council of Trent a religious service was not absolutely essential to its validity. The relation had become indissoluble, except by the decree of the Pope, who in this, as in some other respects, practically filled the place of the old Roman Pontifex, though of course both confarreation and the pontiff had been long forgotten [1]. It carried with it an absorption of the personality of the English wife into that of the husband, whereby all her property passed to him and she became subject to his authority and control. These conditions were the result partly of Teutonic custom, partly of the rudeness of life and manners; and such check as was imposed on them came from the traditions of the Roman law, and from the favour which

[1] The pontifices had a certain oversight over the sacred marriage by *confarreatio*, and their action was needed to effect a *diffareatio*, when it was desired to extinguish the *manus* of the husband over a divorced wife.

the Canon law, much to its credit, showed to the wife. Of this favour some have found a trace in the phrase that occurs in the 'Form for the Solemnization of Matrimony' in the liturgy of the Church of England, where the bridegroom is required to say to the bride, 'with all my worldly goods I thee endow'; although, in point of fact, the law of England gives to the bride only a very limited (and now easily avoidable) right to one-third of the husband's real estate after his death [1].

XII. The English Law of Marriage.

The influence of the Roman system was, of course, less in England than in countries where, as in France and Italy, the Roman law had maintained itself in force, either as written law or as the basis of customary law. But now that we come to consider the course which the English law of marriage has taken, let us note that this law has flowed in two distinct channels down till our own time. So much of it as pertained to the marriage relation itself, that is to say, to the capacity for contracting marriage (including prohibited degrees), to the mode of contracting it, and to its dissolution, complete or partial, belonged to the canon or ecclesiastical law and was administered in the spiritual courts. So much of it as affected the property rights of the two parties (and especially rights to land) belonged to the common law

[1] Others think that this expression, which would seem to refer not to real property but to chattels, is a relic of ancient Teutonic custom. As is observed by Messrs. Pollock and Maitland (*History of English Law*, vol. ii. p. 401), we must not assume that, from the days of savagery down to our own, all changes have been in favour of women. They had apparently more power over their own property in Anglo-Saxon times than in the thirteenth century.

and was administered in the temporal courts. This division, to which there is nothing parallel in the classical Roman law, was of course due to the fact that mediaeval Christianity, regarding marriage as a sacrament, placed it under the control of the Church and her tribunals in those aspects which were deemed to affect the spiritual well-being of the parties to it. Nevertheless the line of demarcation between the two sides was not always, and indeed could hardly be, sharply or consistently drawn. The ecclesiastical courts had a certain jurisdiction as regards property. The civil courts were obliged, for the purposes of determining the right of a woman to dower and the rights of intestate succession, to decide whether or no a proper and valid marriage had been contracted. Their regular course apparently was to send the matter to the bishop's court, and act upon the judgement which it pronounced. But this was not always done. They often had to settle the question for themselves, applying, no doubt, as a rule the principles which the bishop's court would have followed, and (as has been explained by the latest and best of our English legal historians [1]) they often evaded the question of whether there had been a canonically valid marriage by finding that, as a matter of fact, the parties had been generally taken to have been duly wedded, and by proceeding to give effect to this finding.

The ecclesiastical lawyers were not successful in their treatment of such questions as fell within their sphere. The effort to base legal rules on moral and religious principles leads naturally to casuistry, and

[1] Messrs. Pollock and Maitland, in their admirable *History of English Law*, to which the reader curious in these matters may be referred.

away from that common-sense view of human transactions and recognition of practical convenience which ought to be the basis of law. They multiplied canonical disabilities arising whether from pre-contract, a matter to which they gave a far greater importance than had previously belonged to it, or from relationship, either of consanguinity or of affinity; and they indeed multiplied these impediments to such an extent as to make the capacity of any two parties to enter into matrimony matter of doubt and uncertainty, giving wide opportunities for chicane, and an almost boundless scope for the interposition of the Roman Curia, whose sale of dispensations became a fertile and discreditable source of revenue. Their treatment of divorce will be presently examined. In their zeal to keep Christian people out of sin they recognized many clandestine unions as valid, though irregular, marriages, while at the same time applying strict rules of evidence which practically withdrew much of the liberty that had been granted by the lax theory of what constituted a marriage. These tangled subtleties regarding pre-contracts and prohibited degrees were at the time of the Reformation swept away by a statute of 1540 (32 Henry VIII, c. 38), which declared that all marriages should be lawful which were 'not prohibited by Goddis lawe,' and that 'no reservation or prohibition, Goddis lawe except, shall trouble or impeche any marriage without the Levitical degrees.'

Two principles, however, remained unaffected by the legislation of this period in England. The one was the indissolubility of marriage, a topic to which I shall presently return. The other was the freedom of enter-

ing into it, consent, and consent alone, being still all that was necessary to make a marriage valid [1]. England, of course, did not recognize the decrees of Trent, so the old law continued in force after that Council, though motives like those which had guided the Council induced the ecclesiastical courts to lean strongly in favour of the almost universal practice of marrying before a clergyman, and to require in all other cases very strict evidence that a true consent, directed to the creation of lawful matrimony, had in fact been given. Moreover, where the marriage had been irregular, the spiritual courts might compel its celebration in the face of the Church. So things went on, with much uncertainty and some confusion between the act needed to constitute marriage and the evidence of that act, till the middle of the eighteenth century, when a statute was passed in A. D. 1753 (26 Geo. II, c. 33) which required all marriages to be celebrated by a clergyman and in a church (unless by dispensation from the Archbishop of Canterbury), and prescribed other formalities [2]. These provisions remained in force (except as to Jews and Quakers) until 1836, when a purely civil marriage before a Registrar was permitted as an alternative to the ecclesiastical ceremony [3]. During the Com-

[1] The House of Lords was equally divided upon this point in the case of *Reg.* v. *Millis*, in 1843; but historical inquiry tends to confirm the view of Lord Stowell, that the presence of a clergyman was not essential (see *Dalrymple* v. *Dalrymple*, 2 Haggard, p. 54).

[2] The English Dissenters soon began to complain of this Act, as they were thenceforth (until 1836) obliged to be married in church. Charles James Fox used to denounce the Act as 'contrary to the Law of Nature.'

[3] A civil marriage is not, however, compulsory in England as it is in France and some other continental countries. In Scotland it has now become fashionable for Presbyterians to be wedded in church, but the Scottish law, as every one knows, does not prescribe either a clergyman or a registrar.

monwealth marriages had been contracted before justices of the peace, but the Restoration legislation, while validating the marriages so formed, abolished the practice. The old law remained in Ireland, and that was how the question what kind of marriage ceremony was required by the common law came before the House of Lords in the famous case of *Reg.* v. *Millis*, which was an Irish appeal, and the decision in which, declaring that by the common law the presence of a clergyman was required to make a marriage valid, seems to have been erroneous.

XIII. Property Relations of the Consorts under English Law.

Now let us turn to the effect of marriage in the law of England upon the property and the personal rights of the wife.

That effect has generally been described as making the two consorts one person in the law. Such they certainly were for some purposes under the older Common Law of England. The husband has the sole management of all the property which the wife had when married, or which she subsequently received or earned by her exertions. In acquiring all her property he becomes also liable for the debts which she owed before marriage, but after marriage he has not to answer for any contract of hers, because her agreements do not bind him except for necessaries. He is, moreover, liable for wrongs done by her. He cannot grant anything to her, or covenant with her; and if there was any contract between him and her before

marriage, it disappears by her absorption into his personality. She can bring no action without joining him as plaintiff, nor can she be sued without joining him as defendant. She cannot give evidence for or against him (save where the offence is against herself); and if she commit a crime (other than treason or murder) along with him, she goes unpunished (though for crimes committed apart from him she may be prosecuted), on the hypothesis that she did it under his compulsion. So in a case, in the thirteenth century, where husband and wife had produced a forged charter, the husband was hanged and the wife went free, 'because she was under the rod of her husband' (*quia fuit sub virga viri sui*[1]).

But this theory of unity is not so consistently maintained as was the similar theory of the Romans regarding the marriage with Hand power. For the wife's consent to legal acts may be effectively given where she has been separately examined by the Court to ascertain that her consent is free; and even the fact that she must be joined in legal proceedings taken by or against her shows that she has a personality of her own, whereas under the Roman *manus* she was wholly sunk in that of her husband. Thus it is better not to attempt to explain the wife's position as the result of any one principle, but rather to regard it as a compromise between the three notions of absorption, of a sort of guardianship, and of a kind of partnership of property in which the husband's voice normally prevails.

As respects her personal safety, she was better

[1] Pollock and Maitland, vol. ii. ch. vii. p. 404 (quoting Bracton, 429 b).

off than the Roman wife of early days, for the husband could punish the latter apparently even with death, after holding the domestic council, whereas the English husband could do no more than administer chastisement, and that only to a moderate extent. The marital right of chastisement seems to have been an incident to marriage in many rude societies. A traveller among the native tribes of Siberia relates that he found a leather whip usually hung to the head of the conjugal bed, almost as a sort of sacred symbol of matrimony; and he was told that the wife complained if her husband did not from time to time use the implement, regarding his neglect to do so as a sign of declining affection. And it would seem that this notion remains among the peasantry of European Russia to this day[1].

Everybody has heard of the odd habit of selling a wife which still occasionally recurs among the humbler classes in England; and most people suppose that it descends from a time when the Teutonic husband could sell his consort, as the Roman one apparently could in the days of Hand power. There is, however, no trace at all in our law of any such right[2], though a case is reported to have arisen in A. D. 1302, when a husband granted his wife by deed to another man, with whom she thereafter lived in adultery[3].

The compensation given to the English wife for the loss (or suspension during the marriage) of her control

[1] Kovalevsky, *Modern Customs and Ancient Laws of Russia*, p. 44.

[2] My friend Mr. F. W. Maitland, whose authority on these matters is unsurpassed, informs me that he knows of no such trace. The practice, however, seems to have been not uncommon. Several instances of the sale of a wife by auction, sometimes along with a child, are reported from Kent between 1811 and 1820.

[3] See Pollock and Maitland, vol. ii. p. 395.

over her property is to be found in her right of Dower, that is, of taking on her husband's death one-third of such lands as he was seised of, not merely at his death, but at any time during the marriage, and which any issue of the marriage might have inherited. As this right interfered with the husband's power of freely disposing of his own land, the lawyers set about to find means of evading it, and found these partly in legal processes by which the wife, her consent being ascertained by the courts, parted with her right, partly by an ingenious device whereby lands could be conveyed to a husband without the right of dower attaching to them, partly by giving the wife a so-called jointure which barred her claim. The wife has also a right, which of course the husband can by will exclude, of succeeding in case of intestacy to one-third of his personal property, or, if he leave no issue, to one-half.

This state of things hardly justifies the sleek optimism of Blackstone, who closes his account of the wife's position by observing, 'even the disabilities which the wife lies under are, for the most part, intended for her protection and benefit. So great a favourite is the female sex of the laws of England.' The Romans, although they allowed to women a fuller independence, were more candid when they said: 'In many points of our law the condition of the female sex is worse than that of the male.'

XIV. Gradual Amendment of the English Matrimonial Law.

However, the Courts of Equity ultimately set themselves in England to improve the wife's condition.

They recognized some contracts and grants between husband and wife. They allowed property to be given to trustees for the sole and separate use of a wife; and if it was given to her with an obvious intent that it should be for her exclusive benefit, they held the husband, in whom by operation of the general law it would vest, to be a trustee for the wife. When during marriage there came to a wife by will or descent any property of which the husband could obtain possession only by the help of a Court of Equity, they required him to settle a reasonable part of it upon the wife for her separate use. And in respect of her separate property, they furthermore permitted the wife to sue her husband, or to be sued by him. While these changes were in progress, there had grown up among the wealthier classes the habit of making settlements on marriage which secured to the wife, through the instrumentality of trustees, separate property for her sole use, and wherever a woman was a ward of Court, the Court insisted, in giving its consent to the marriage, that such a settlement should be made for her benefit.

By these steps a change had been effected in the legal position of women as regards property similar to, though far more gradual, and in its results falling far short of, the change made at Rome when the marriage without Hand power became general. But in England a recourse to the Courts has always been the luxury of the rich; and as the middle and poorer classes were not wont to go to the Courts, or to make settlements, it was only among the richer classes that the wife's separate estate can be said to have existed. At last, however, the gross injustice of allowing a selfish or

wasteful husband to seize his wife's earnings and neglect her was so far felt that several Acts were passed (the first in 1857), under which a woman deserted by her husband may obtain from a magistrate a judicial order, protecting from him any property she may acquire after desertion. By this time an agitation had begun to secure wider rights for married women. It had great difficulties to overcome in the conservative sentiment of lawyers, and of those who are led by lawyers, and more especially of members of the House of Lords. Not till 1870 did the British Parliament take the step which the Romans had taken long before the Christian era, and which many American States had taken in the first half of the nineteenth century. A statute of that year, amended and extended by others of 1874 and 1882, swept away the old rule which carried all the wife's property over to the husband by the mere fact of marriage; so that now whatever a woman possesses at her marriage, or receives after it, or earns for herself, remains her own as if she were unmarried, while of course the husband no longer becomes liable by marriage to her ante-nuptial debts. By these slow degrees has the English wife risen at last to the level of the Roman. The practice of making settlements on marriage still remains, especially where the wife's property is large, or where there is any reason to distrust the bridegroom; for though the interposition of trustees is no longer needed to keep the property from falling by operation of law into the husband's grasp, he may still press or persuade her to part with it, since she now enjoys full disposing power, and if she does part with it, she and the children may suffer. Thus custom sustains in England,

and perhaps will long sustain, a system resembling that of the Roman *Dos*. Yet the number of persons possessing some property who marry without a settlement increases, as does the number of women whose strength of will and knowledge of business enables them to hold their own against marital coaxing or coercion.

It need hardly be said that the personal liberty of the wife was established long before her right to separate property. Says Blackstone (writing in 1763):—

'The husband by the old law might give his wife moderate correction. For as he is to answer for her misbehaviour, the law thought it reasonable to entrust him with his power of restraining her, by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife *aliter quam ad virum, ex causa regiminis et castigationis uxoris suae, licite et rationabiliter pertinet*. But in the politer reign of Charles the Second this power of correction began to be doubted, and a wife may now have security of the peace against her husband, or, in return, a husband against his wife. Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege; and the Courts of Law will still permit a husband to restrain a wife of her liberty in case of any gross misbehaviour [1].'

This touching attachment to their old common law still survives among 'the lower rank of people' in the form of wife beating. But among the politer classes the right to restrain a consort's liberty (except under

[1] Blackstone, *Commentaries*, vol. i. bk. i. chap. 15.

very special circumstances) may be deemed to have become exploded since the case of *Reg.* v. *Jackson* in 1891[1]. So that now the English wife, like the Roman, may quit her husband's house when she pleases, and the suit for restitution of conjugal rights, whereby either could compel the other to live in the common household, is falling into disuse, if indeed it can still be described as in any sense effective since the Act, passed in 1884, which took away the remedy by attachment.

The interest which belongs to these changes in the law, changes generally similar in their result in the English and in the Roman systems, though far more gradually made in the former than in the latter, is the interest of observing the methods whereby custom and legislation have sought to work out different possible theories of the marriage relation. There are usually said to be two theories, that of Mastery, and that of Equality. On the former the husband is lord of the wife's property as well as of her person. The law puts her at his mercy, trusting that affection, public opinion, and a regard for domestic comfort will restrain the exercise of his rights. On the other theory, each consort is a law to him- or herself, each can dispose of his or her property, time, and local presence without the assent of the other. The law

[1] 1 Q. B. p. 671 (in the Court of Appeal). The judgements are instructive. The Master of the Rolls goes so far as to doubt whether the husband ever had a legal power of correction, a curious instance of the way in which the sentiment of a later time sometimes tries to force upon the language of an older time a non-natural meaning, the new sentiment being one which the older time would have failed to understand. It would have been simpler to admit that what may well have been law in the seventeenth century is not to be taken to be law now, manners and ideas having so completely changed as to render the old rules obsolete.

allows this freedom in the hope that affection, respect, and the opinion of society will prevent its abuse. Yet these two theories, that with which both Rome and England began, that with which both Rome and England have ended, do not exhaust the possibilities of the relation. For there is a third theory which, more or less consciously felt to be present, has influenced both the one and the other, creating a sort of compromise between them. It is the theory of a partnership in social life and in property similar to the partnership which necessarily exists as regards the children of a marriage. This idea is expressed by the form which the Mastery theory took when it declared husband and wife to be 'one person in the law,' and in the Anglican marriage service where the wife's promise to obey [1] is met by the husband's declaration that he endows her with all his worldly goods. It also qualifies the theory of Equality and Independence by the practice of creating a settlement in England, and a *Dos* (and *Donatio propter nuptias*) at Rome, in which each of the married pair has an interest.

Any one can see that the Mastery theory, against which modern sentiment revolts, was more defensible in a time of violence, when protection for life and property had to be secured by physical force as well as by recourse to the law, than it is to-day. Any one can also see that there are even to-day households for which the Mastery theory may be well suited, as there also are, and always have been, even in days of rudeness and in Musulman countries, other households where the wife

[1] This promise does not appear in the forms of marriage service commonly used by the unestablished churches of England, or most of them.

was, and rightly was, the real head of the family. Those moreover who, judging of other times by their own, think that the position of the wife and of women generally must have been, under the Mastery theory, an intolerable one, need to be reminded not only that the practical working of family life depends very largely on the respective characters of the persons within the family, and on the amount of affection they entertain for one another, but also that it is profoundly modified by the conception of their relations which rules the minds of these persons. Law, itself the product and the index of public opinion, moulds and solidifies that conception, and the wife of the old stern days of marital tyranny saw no indignity or hardship in that position of humble obedience which the independent spirit of our own time resents.

XV. Divorce under the Canon Law.

There is one more point in which opposite theories of marriage have to be contrasted, and in which the contrast appears most strikingly. This is the point which touches the permanence of the relation.

We have already seen what were the provisions of the Roman law upon the subject of Divorce. Those provisions continued to prevail in Western Europe after the fall of the Empire, until, apparently in the eighth, ninth, and tenth centuries, new rules enforced by the Church superseded them in the regions where the imperial law had been observed. A similar change occurred later in other countries such as England and Germany, where the ancient customs of the barbarian tribes had allowed the husband, and apparently in some

cases the wife also, to dissolve the marriage and depart. From the twelfth century onwards the ecclesiastical rules and courts had undoubted control of this branch of law all over Christian Europe. Now the Church held marriage to be a sacrament and to be indissoluble. Divorce, therefore, in the proper sense of the term, as a complete severance of a duly constituted matrimonial tie, was held by the Church inadmissible. This view was based on the teaching of our Lord as given in the Gospels [1], and was enforced on every bridal pair in the liturgical form employed at marriage, as indeed it is in the English liturgy to-day. Nevertheless, the Church recognized two legal processes which were popularly, though incorrectly, called divorces.

One of these, called the divorce from the bond of marriage (*a vinculo matrimonii*), was in reality a declaration by ecclesiastical authority—that of the Pope, or a deputy acting under him—that the marriage had been null from the beginning on the ground of some canonical impediment, such as relationship or pre-contract. As already observed, the rules regarding impediments were so numerous and so intricate that it was easy, given a sufficient motive, whether political or pecuniary, to discover some ground for declaring almost any marriage invalid. The practice of granting divorces of this class, which was constantly made a means of obliging the great ones of the earth and augmenting papal revenues, may sometimes have been really useful for the purpose of dissolving the ill-assorted unions of those who could secure a decree from the ecclesiastical authorities.

[1] Messrs. Pollock and Maitland refer to the dooms of Aethelbert as showing the permissibility of divorce in early English law (*History of English Law*, vol. ii. p. 390).

Technically, however, it was not a dissolution of marriage, but a declaration that no marriage had ever existed, and therefore it rendered children born in the relation illegitimate [1].

The other kind of divorce was that called 'from board and bed' (*a mensa et thoro*). It was a regular part of the jurisdiction of the Church Courts, and effected a legal separation of the two parties from their joint life in one household, while leaving them still man and wife, and therefore unable to marry any other person. The status of the children was of course not affected.

XVI. The Later Law of Divorce in England and Scotland.

This law prevailed over all Europe till the Reformation, and continued to prevail in all Roman Catholic countries till a very recent time. In some it still prevails, at least so far as Roman Catholics are concerned. But in most Protestant countries it received a fatal shock from the denial, in which all Protestants agreed, of the sacramental character of marriage, and from the revival, in some of such countries, of the view of marriage as a purely civil contract. Thus in Scotland the courts began, very soon after the Roman connexion had been repudiated, to grant divorces; and in A.D. 1573 a statute added desertion to adultery as a ground for divorce. In England, however, where the revulsion against the doctrines of mediaeval Christianity was less pronounced, and where the Ecclesiastical Courts retained their jurisdiction in matrimonial causes, the old

[1] But canonical ingenuity discovered methods by which in some cases the legitimacy of the children might be saved though the marriage was declared void.

law went on unchanged, save that after the abolition of many of the canonical impediments, mentioned above, divorces *a vinculo*, declaring marriages to have been originally invalid, became far more rare. Nevertheless, attempts had been made by some of the more energetic English Reformers to assert the dissolubility of marriage. A draft ecclesiastical code (called the *Reformatio legum ecclesiasticarum*) was prepared, but never enacted; and Milton argued strongly on the same side in his well-known but little read book. About his time cases begin to occur in which marriages were dissolved by Acts of Parliament; a practice which became more frequent under the Whig régime of the early Hanoverian kings, and ultimately ripened into a regular procedure by which those who could afford the expense might secure divorces. The party seeking divorce was required to first obtain from the Ecclesiastical Court a divorce *a mensa et thoro*, which obtained, he introduced his private Bill for a complete divorce. It was heard by the House of Lords as a practically judicial matter, in which evidence was given, and counsel argued the case for and (if the other party resisted) against the divorce. It was usually by the husband that these divorce Bills were promoted, and indeed no wife so obtained a divorce till A.D. 1801 [1].

This characteristically English evasion of that principle of indissolubility for which such immense respect was professed lasted till 1857, long before which time the existence of a law which gave to the rich what it refused

[1] There had also sprung up the practice of effecting private separations between a husband and a wife by means of a deed executed by each of them, and such a deed presently came to be recognized as a defence to a suit by either party for the restitution of conjugal rights.

to the poor had become a scandal[1]. In that year an Act was passed, not without strenuous opposition from those who clung to the older ecclesiastical theory, which established a new Court for Divorce and Matrimonial causes, empowered to grant either a complete dissolution of marriage (divorce *a vinculo matrimonii*) or a 'judicial separation' (divorce *a mensa et thoro*). This statute adhered to the rule which the practice of the House of Lords had established, and under it a husband may obtain a divorce on proof of the wife's infidelity, whereas the wife can obtain it only by proving, in addition to the fact of infidelity on the husband's part, either that it was aggravated by bigamy or incest, or that it was accompanied by cruelty or by two years' desertion. To prevent collusion a public functionary called the Queen's Proctor is permitted to intervene where he sees grounds for doing so. Misconduct by the husband operates as a bar to his obtaining a divorce. Thus the law of England stands to-day. Attempts have been made to alter it on the basis of equality, so that whatever misconduct on the wife's part entitles a husband to divorce shall, if committed by the husband, entitle her likewise to have the marriage dissolved. But these attempts have not so far succeeded[2].

[1] Probably the English Jews were permitted to exercise in the seventeenth and eighteenth century the right of divorce which their own law gave them. But in those days the Jews were so cut off from the general English society that the phenomenon passed almost unnoticed. They were a very small community, living practically under their personal law, as the Parsis do in Western India to-day.

[2] The Act of 1857 (amended in some points by subsequent statutes) contains provisions intended to prevent collusion between the parties, and empowers the Court to regulate the property rights of the divorced persons and the custody of the children (if any) of the marriage.

The law of Scotland is more indulgent, and not only permits a wife to obtain divorce for a husband's infidelity alone, but also recognizes wilful desertion for four years as a ground for divorce. In other respects its provisions are generally similar to those of the English law. Ireland, however, remains under the old pre-Reformation system. There is no Divorce Court, and no marriage can be dissolved save by Act of Parliament. The bulk of the people are Roman Catholics, and among Protestants as well as Roman Catholics the level of public sentiment and of conjugal morality has apparently been higher than in England, nor have attempts been made, at any rate in recent years, to obtain the freedom which England and Scotland possess. The United Kingdom thus shows within its narrow limits the curious phenomenon of three dissimilar systems of law regulating a matter on which it is eminently desirable that the law should be uniform. England has a comparatively strict rule, and one which is unequal as between the two parties. Scotland is somewhat laxer, but treats both parties alike. Ireland has no divorce at all. So little do theoretical considerations prevail against the attachment of a nation to its own sentiments and usages.

I reserve comments on these systems till we have followed out the history of the English matrimonial law in the widest and most remarkable field of its development, the United States of America.

XVII. The Divorce Laws of the United States.

When the thirteen Colonies proclaimed their separation from Great Britain in 1776, they started with the Common Law and all such statute law as had in fact been in force at the date of the separation. Accordingly they had no provision for dissolving marriages, nor any Ecclesiastical Courts to grant dissolutions, seeing that such tribunals had never existed in America, where there had been no bishops. Presently, however, they began to legislate on the subject, and the legislation which they, and the newer States added to the Union since 1789, have produced presents the largest and the strangest, and perhaps the saddest, body of legislative experiments in the sphere of family law which free, self-governing communities have ever tried. Both marriage and divorce belong, under the American Constitution, to the several States, Congress having no right to pass any laws upon the subject, except of course for the District of Columbia and the Territories. Thus every one of the (now) forty-five States has been free to deal with this incomparably difficult and delicate matter at its own sweet will, and the variety of provisions is endless. As it would require a great deal of space to present these in detail, I shall touch on only some salient points.

Originally, the few divorces that were granted were obtained, following the example of England, by means of Acts of the State legislature. The evils of this plan were perceived, and now nearly all the States have by their Constitutions forbidden the legislature to pass such Acts, since Courts have been provided to

which application may be made. These are usually either the ordinary inferior Courts of the State, or the Chancery Courts (where such survive). No State seems to have, like England, erected a special Court for the purpose. One State only, South Carolina, does not recognize divorce at all. In 1872, under the so-called 'carpet-bagger government,' set up after the War of Secession, a statute was passed in that State authorizing divorces for infidelity or desertion, but in 1878, when the native whites had regained control, this statute was repealed, so that now, if a divorce is obtained at all, it must be obtained from the legislature outside the regular law. South Carolina has the distinction of being to-day probably the only Protestant community in the world which continues to hold marriage indissoluble. No State has fewer Roman Catholic citizens: Presbyterians and Methodists are the strongest religious bodies.

The causes for which divorce may be granted range downwards from the strictness of such a conservative State as New York, where conjugal infidelity is the sole cause recognized for an absolute dissolution of the marriage, to the laxity of Washington, where the Court may grant divorce 'for any cause deemed by it sufficient, and when it shall be satisfied that the parties can no longer live together.' Desertion is in nearly all States recognized as a ground for dissolution. So is cruelty by either party, or the reasonable apprehension of it by either. So in many States the neglect of the husband to provide for the wife, habitual intemperance, indignities or insulting treatment, violent temper, and (in a smaller number) the

persistent neglect of her domestic duties by the wife, grave misconduct before marriage unknown to the other party, insanity, an indictment for felony followed by flight, vagrancy, are, or have been, prescribed as among the sufficient grounds for divorce. In some States a sentence of imprisonment for life *ipso iure* annuls the marriage of the prisoner, permitting the other partner to remarry, and, in most, conviction for felony or infamous crime is a ground on which the Court may decree, and presumably will decree, the extinction of the marriage. Moreover, there are still a few States where over and above the judicial process open to a discontented consort, the State legislature continues to grant divorces by special statutes. Delaware is, or very recently was, such a State; and in the twenty years preceding 1887 it would seem that four-fifths of its divorces, not indeed very numerous (289 for twenty years), were so obtained. The laws of most States also provide for what the Americans call a 'limited divorce,' and the English a 'judicial separation,' equivalent to the old divorce *a mensa et thoro*. It leaves the marriage still valid, but relieves the parties from any obligation to live together; and in some States the Court in pronouncing a decree of divorce may change the name of the wife (in Texas and Arizona the name of either party), while in Vermont it may also change the names of the children who are minors.

Not less remarkable than the multiplication of grounds for divorce in the American States is the extreme laxity of procedure which has grown up. The Courts having jurisdiction are usually the Courts of the county, tribunals of no great weight, whose ill-paid judges are

seldom men of professional eminence. The terms of residence within a State which are required before a petitioner can apply for a divorce are generally very short. The provisions for serving notice on the respondent or defendant to the divorce suit are loose and seem to be carelessly enforced. Some States allow service to be effected by publication in the newspapers, if the other party be not found within the State, and this of course often happens when the applicant has recently come to the State, most likely a distant one, from that in which he or she lived with the other consort. Frequently he comes for the express purpose of getting his marriage dissolved. Although most States declare collusion or connivance by the other party to be a bar to the granting of a divorce, and some few States provide that a public official shall appear to defend in undefended petitions, the provisions made for detecting these devices are inadequate; and in not a few cases the proceedings do little more than set a judicial seal upon that voluntary dissolution by the agreement of the two consorts, which was so common at Rome. It is doubtless a point of difference between the Roman law and that of modern American States that in the former the parties could by their own will and act terminate the marriage: in the latter the Courts must be invoked to do so. But where the Courts out of good-nature or carelessness make a practice of complying with the application of one party, unresisted or feebly resisted by the other, this difference almost disappears. The facilities which some of the more lax States hold out to those who come to live in them for the requisite period, and who then procure from the complaisant Court a divorce without the

knowledge of the other consort, constitute a grave blot on the administration of justice in the Union generally, for a marriage dissolved in one State (where jurisdiction over the parties has been duly created) is *prima facie* dissolved everywhere[1]; and although the decree might conceivably be reversed if evidence could be given that it had been improperly obtained, it is usually so difficult to obtain that evidence that the injured party, especially an injured wife, must perforce submit.

XVIII. Statistics of Divorce in America.

Under these lax laws, and the not less lax administration of them, the number of divorces has in the United States risen with formidable rapidity. In 1867 there were 9,937 granted, in 1886, 25,535, an increase of nearly 157 per cent. in twenty years. The total number recorded to have been granted in those twenty years (and the record is probably not quite complete) is 328,716, a ghastly total, exceeding all the divorces granted in the same years in all other Christian countries[2]. The population of the Republic increased about 60 per cent. within the same twenty years. Taking the two census years 1870 and 1880, the percentage of increase was, for the population, 30·1, for divorce, 79·4, or more than twice as great; and while in many States the percentage of divorce increase is

[1] In two or three States the law provides that when an inhabitant goes into some other State for the purpose of getting a divorce for a cause arising within the State, or for a cause which the law of the State would not authorize, a divorce granted to him shall have no effect within the State.

[2] In Canada during the same twenty years only 135 divorces were granted in a population which was, in 1881, 4,324,000. In some provinces of the Dominion divorces could be obtained only by private Act of Parliament.

far larger than 79·4, there are only five in which divorce has not grown faster than population.

The increase is most rapid in the south-western States, in several New England States, and especially in the States of the far West, less marked in the north Atlantic States generally, and in those between the Atlantic and the Mississippi. It is greater in cities than in rural districts [1].

It is, in the South, apparently somewhat greater among the coloured people than among the whites [2]. It is greater among native-born Americans than among immigrants from Europe. And it need hardly be said that it is far larger among Protestants than among Roman Catholics. These points deserve to be remembered, because they throw some light on the causes which have produced the increase.

Some other facts to be noted before we pass on to consider those causes are the following.

The grounds on which divorces have been granted are often trivial, even frivolous. I select a few from a long list given in the American Official Report dealing with the subject [3].

[1] In an interesting article in the *Political Science Quarterly* for March, 1893, Mr. W. F. Willcox (now (1900) of the U. S. Census Office) argues that the divorce rate is influenced by depression of trade, declining when the lower middle and working class, among whom it is frequent, are less able to afford it.

Mr. Willcox quotes some remarkable figures from Japan showing an extremely high divorce rate there. In 1886 there were in Japan 315,311 marriages and 117,964 divorces. This is four and a-half times the rate in the U. S. of America, which comes next.

[2] The conditions prevailing among a coloured population which had, under slavery, no legal marriage, go far to explain this phenomenon.

[3] This Report, published in 1889 by the United States Labour Bureau at Washington, contains many instructive data. The Annual Reports of the voluntary Association, called the League for the Protection of the Family,

A wife alleges that her husband has accused her sister of stealing, thereby sorely wounding her feelings.

Another says, 'During our whole married life my husband has never offered to take me out riding (= driving). This has been a source of great mental suffering and injury.'

Another complains that her husband does not wash himself, 'thereby inflicting on plaintiff great mental anguish.'

Another says that her husband 'quotes verses from the New Testament about wives obeying their husbands. He has even threatened to mash the plaintiff, and has drawn back his hand to do it.' The decree which awarded a divorce to this wife contains the following: 'I find that when plaintiff was sick and unable to work defendant told her the Lord commanded her to work, and that he was in the habit of frequently quoting Scriptural passages in order to show her she was to be obedient to her husband.'

A wife alleges that her husband does not come home till ten o'clock at night, and when he does return he keeps plaintiff awake talking. He also keeps a saloon, which sorely grieves mind of plaintiff. He replies, saying, 'Plaintiff should not be ashamed of him because temporarily in the liquor business: that he may do better some day: his father was a high State Officer in Germany.' This wife gets a divorce on the ground of 'mental cruelty.'

In all these cases, and in many others enumerated in

also deserve to be consulted. Its corresponding secretary is the Rev. Dr. S. W. Dike of Auburndale, Mass., who has written a number of thoughtful articles upon the subject, and to whom I am much indebted for documents supplied to me and for the expression of his own views.

the Report where the grounds are equally slight, the divorce is granted. And similar cases are given in which the husband obtains divorce on the ground of the wife's cruelty.

'Mental cruelty' is of course a term hard to define, as may be seen by examining the views that have been expressed by English judges on cruelty, and it is not wonderful that the easy-going courts of most American States should give a wide extension to such an elastic conception.

Of the causes recorded as those for which marriages are dissolved, the most frequent are Desertion, which represents 38·5 of the whole number of divorces; then Infidelity; then Cruelty; then Intoxication. Of the total number of divorces granted during the twenty years 1867–1886, 65·8 per cent., very nearly two-thirds, were granted to wives and 34·2 per cent. to husbands. Of the total number granted for infidelity 56·4 per cent. were granted to husbands and 43·6 to wives. But in the other chief causes wives are more frequently the successful applicants. In cruelty they obtain seven times as many decrees; in desertion one and a-half times as many; in intoxication eight times as many. The Report, however, shows that intemperance is either directly or indirectly responsible for a larger proportion of the total cases than its place in the table represents.

I take from a valuable paper by an Ohio lawyer (Mr. Newton D. Baker)[1] some facts which illustrate the state of things in one of the so-called 'Western Reserve' counties in that great State. In Cuyahoga county the total yearly number of marriages is about

[1] *Western Reserve Law Journal* for October, 1899.

3,400, and the number of divorce suits annually brought is about 500. In the year 1898–1899, the whole number of divorce suits brought in the Court of Common Pleas was 562 out of a total number of 3,848 suits for all causes, *i.e.* about 12 per cent. In the State of Ohio the annual number of marriages is from 33,000 to 40,000; the total number of divorce suits brought from 3,700 to 4,200; and the total number of divorces granted annually about 3,000 in a population of about 4,000,000. Mr. Baker observes that 'five of the causes on which the law allows divorce, viz. wilful absence of either party from the other for three years, extreme cruelty, fraudulent contract, any gross neglect of duty, and habitual drunkenness for three years, are all so vague and elastic as to amount to unrestricted licence in the matter of divorce.' Out of 366 divorces granted in the year 1898–1899, wilful absence and gross neglect of duty accounted for 150, extreme cruelty for 109, habitual drunkenness for 88, and infidelity for 14 only (five being unaccounted for). He adds, 'The personal temper and disposition of individual judges (there are more than eighty in the State entrusted with power to dissolve marriages) have come to be so well recognized as the limits of the jurisdiction of the Common Pleas Court in granting divorces, that now it is the practice of many lawyers to continue and delay the hearing of divorce causes until some judge, known to be lenient in this matter, rotates to the bench of the Court in which such cases are set for hearing. . . . Many of the judges appear to be oblivious to the fact that one of the most important interests of society is at stake in every divorce proceeding, and either out of unscientific ideas upon the

subject, or out of mere complaisancy towards attorneys and litigants, they have lent themselves to a looseness of practice which is in some degree responsible for the deplorable results.'

In the United States applications for divorce are mostly made after a marriage of short duration. In one-half of the cases divorce was granted within six years from the date of marriage. Oddly enough, the average duration of a marriage terminated by divorce varies much between State and State. It is shortest in the southern States, falling to 6·48 years in Arkansas, and 6·91 in Tennessee, highest in the north-east, rising to 11·69 in New Jersey, and 12·12 in Massachusetts. This may be partly due to the fact that the more conservative States require a longer period of desertion to be proved. The duration of marriage is somewhat longer in cases where the wife applies, which may indicate either that she is more patient under her lot than the husband, or that her comparative ignorance of the world makes her less able to resort to the Courts. The fact that desertion is the cause most frequently assigned by wives may also have its effect.

It would be important to know what proportion the desire to marry some one else bears to the other causes which induce persons to seek to escape from their existing wedlock. Unfortunately American statistics of marriage, which are in many States loosely kept, do not enable us to answer this question[1]. Practising

[1] The Report for 1891 of the League for the Protection of the Family says: 'Connecticut for two years reports the number of divorced persons married each year. In 1889 there were 286 such—135 men and 151 women, which is a little above one-third the number divorced in the year. In 1890 there were 477 divorces granted, or 954 individuals divorced; and there were 350 divorced persons—this year 207 women and 143 men—who

lawyers say that nothing is commoner. It would appear, however, from some European[1] figures that there is in reality no greater tendency for divorced men, and scarcely any greater tendency for divorced women, to remarry within a few years of the dissolution of their marriage than there is for widowers and widows to do so after the death of a consort; and it has often been observed that persons who have been most happily married are among those most likely to marry again.

The rapid growth of divorce under the hasty legislation which marked the first half of the present century began about thirty years ago to create some alarm in the United States. The subject was much discussed, an association was formed to grapple with the evil, and in several States laws were passed restricting a little the causes entitling persons to be divorced[2]. In those States there has accordingly been some slight diminution in the number of divorces granted, but elsewhere the rate has gone on increasing, though apparently (for there are no very recent statistics) a little more slowly than it was doing down to 1886. In some States it seems, after increasing, to have now reached a stable average to the population. This would appear to be the case in Switzerland also.

married again during the year. An extended induction along this line should be possible. Guesses based on mere observation are untrustworthy guides in legislation or social reform.'

[1] This point has been worked out by M. Bertillon, a well-known French statistician. I owe my knowledge of it to an acute and suggestive paper (some of whose conclusions however seem to me questionable) by Mr. W. F. Willcox, of Cornell University, New York. 'The Divorce Problem': New York, 1891.

[2] Efforts have recently been made to induce States to adopt identical legislation on this among other topics; and there seems to be a prospect that a certain number will do so.

XIX. Divorce in Modern European Countries.

It is not only in America that the evil grows. In all modern countries where divorce is permitted, that is to say in all Protestant and some Roman Catholic States, the same tendency is perceptible. Among the Protestant nations the impulse of the Reformation caused sooner or later a rejection of the old canonical doctrine of indissolubility; so we may say, speaking broadly, that in Germany, Switzerland, Holland, Denmark, Sweden and Norway, a marriage may be dissolved not only for the infidelity of either party (since in all these countries husband and wife are treated alike), but also for desertion and imprisonment for crime. Some laws go even further, allowing mutual consent to be a cause. Among Roman Catholic countries, France retained the canonical rule till the Revolution. The legislation of 1792 granted extreme freedom, which was so largely used that we are told that in 1797 there were more divorces than marriages. In 1816 the principles of Catholicism regained control, and held it till 1884, when a law was passed permitting marriages to be dissolved for the infidelity of either party, or for the condemnation of either to an infamous punishment, and authorizing the transmutation into an absolute divorce of a judicial separation which has lasted for three years. The law of Belgium is similar, but goes a little further in allowing mutual consent to be a ground, though one surrounded by many restrictions. Austria and Hungary allow divorce (under rules similar to those of Protestant countries, *i.e.* on the grounds of infidelity, grave crime, desertion, cruelty, &c.) to non-Catholic citizens, while

Italy, Portugal, and Spain adhere to the Tridentine system which recognizes only a judicial separation (*a mensa et thoro*) and not a dissolution of the tie. Russia still leaves matrimonial causes to the ecclesiastical courts, but allows them to dissolve marriages on the ground of infidelity, a heavy criminal sentence, or disappearance of one consort for five years [1].

In nearly all these countries such statistics as are available show an increase in the number of divorces during recent years. For instance in Belgium, a predominantly Roman Catholic country, divorces rose between 1884 and 1893 from 221 to 497. In France the suits for divorce rose from 1773 in 1884 to 7445 in 1891. The number of divorces compared with the number of marriages almost doubled in those seven years. In the German Empire there were 5342 divorces granted in 1882 and 6178 in 1891. In Holland they were, in 1883, 189, in 1892, 354. A like period saw them rise in Sweden from 218 to 316, in Norway from 7 to 82 (!), in Greece from 251 to 788. The rise is slighter in Austria. Switzerland alone, though its law is comparatively lax, shows no increase [2]. In England divorces rose from 127 in 1860 to 390 in 1887, an increase much more rapid than that of population or of marriages [3]. Judicial separations rose between the same years from 11 to 50. In Scotland divorces which in 1867 numbered 32 had, in 1886, grown to 96, a still more rapid

[1] According to a high Russian authority, divorce was freely practised by the Russian peasantry under their ancient customs.

[2] I take the above figures from *Parliamentary Paper* [C–7639] of 1895. No figures are given for Russia or Denmark.

[3] Parliamentary Return of March 9, 1889.

rise, as it covers only twenty instead of twenty-seven years. It is worth noting that in England it is usually the husband who petitions for a divorce, and almost always the wife who seeks a judicial separation.

The growth in so many otherwise dissimilar countries of this disposition to shake off the marriage tie is a remarkable phenomenon, which deserves more attention than it seems to have yet received in England. Though strongest in Protestant countries, it is not confined to them, as appears from the instances of Belgium, Bavaria and Greece. Though there is no divorce *a vinculo* in Italy or Spain, the same causes which make it frequent elsewhere may be at work, though less conspicuously, in countries where the State aids the Church in checking their outward manifestation. Divorce is an obtrusive symptom of the disease, not the disease itself.

What is the disease? or, lest we should seem to prejudge the merits of the matter, what is the source of this disposition to look upon the marriage tie with eyes different from those of a century ago, and to yield more easily to the temptation to dissolve it? The cause, whatever it is, must lie deep, for it manifests itself under many different conditions; and it may possibly be not any single cause, but a combination of several concurrent social or moral changes, independent springs whose confluence swells the stream of tendency.

A similar phenomenon happened once before in history. At Rome also, as we have already seen, a very strict theory of marriage and a corresponding strictness in practice gave way to great laxity of the law and, after a short interval, to unbounded licence in practice.

Let us see whether we can, by examining the phenomena which brought about this change in the greatest of ancient States, hit upon any clue that may serve to explain the facts of our own time.

XX. Comparison of the Process of Change at Rome and in the Modern World.

The Romans began with a doctrine of marriage which had four salient characteristics[1]:

A formal legal act almost invariably accompanying marriage.

A religious element in the oldest form of this act.

A subjection of the wife to the husband's power.

A complete absorption of the wife's property rights into the legal personality of the husband.

These characteristics all vanished; and under the newer law and custom of the city, and ultimately of the Empire—

The act of marriage required no formalities, and was entirely a private affair.

It was also a purely civil, not a religious, affair.

The wife became absolutely independent of her husband, remaining (unless she had been emancipated) in the legal family of her father.

The wife's property remained her own, though it was usual for the consorts to have some joint property.

Concurrently with and following on these changes

[1] See above, p. 388 sqq. Although no formal legal act and no religious rites were absolutely required for marriage at the time when we first discover the Roman Law as a working system, the practice of using either such an act or such rites was all but universal.

there had come about in Rome a general decline of faith in the old deities, a faith partially, but not beneficially, replaced by Oriental superstitions. There had also come habits of luxury, a thirst for material enjoyment, a passion for amusements, a general relaxation of the moral restraints which public opinion had formerly imposed. Marriage had begun to be regarded mainly from the point of view of pecuniary interest or social advancement. There was comparatively little sentiment attaching to it, and not much sense of duty. Men grew less and less willing to marry; women as well as men less and less faithful. Fewer children were born. As neither religious nor moral associations sanctified the relation, and as it could be terminated at pleasure, it was lightly entered on, and this very heedlessness, making it frequently a failure, caused it to be no less lightly dissolved. Thus social habits and a standard of opinion were formed, against which the reforming efforts of Augustus and his successors could do little, and which resisted even the far more powerful efforts of Christianity, until Roman society itself went to pieces in the West, and passed into new forms in the East.

This decadence of the matrimonial relation was doubtless facilitated by three peculiarities of the law, viz. the absence of all prescribed forms for marriage and divorce, which set caprice free from legal restraints or delays, the extinction of any necessary connexion as regards property between the two spouses[1], and the fact that the legal family did not

[1] The *Dos* supplied a connexion, but the wife's right to claim it at the end of the marriage was not greatly affected by her conduct (see pp. 397 and 406 *supra*).

coincide with the natural family, for legally the wife remained in her father's family and did not enter her husband's. Nevertheless the underlying causes of that decadence were social and moral rather than legal causes.

In the modern world the change from the old state of things to the new has been slower and less complete. Still it offers a kind of parallel to the phenomena we have been considering.

Before the Reformation what were the features of the marriage relation in Europe?

It had a strongly religious character. Its formation was blessed by the Church. It was deemed a Sacrament. It was treated, for doctrinal reasons, as indissoluble. There were, to be sure, plenty of marriages essentially unhallowed, plenty of marriages contracted for the most sordid reasons, plenty of marriages with little affection; and there were also marriages tainted by sin. The standard of conjugal fidelity was in the fifteenth century a low one. Nevertheless the tie was deemed to be one which religion sanctified, and religious sentiment must have had a restraining effect upon tender consciences, and particularly upon the wife, women being usually more susceptible to religious emotion than men are.

It gave the husband, in most countries, and notably in England, an almost complete control over the property rights of the two spouses, and in this way held them together.

It gave the husband, and notably in England, almost complete control over the person and conduct of the wife, impressing upon her mind her dependence on

him, and her duty to obey him. No doubt where the wife's intellect or will was the stronger of the two her intellect guided or her will prevailed. Nevertheless her normal attitude was that of a submissive identification of her wishes and interests with his.

Whether these things made for affection, and for happiness, the outcome of affection, is another question. What we have to remark is that at any rate they drew the bond very tight, and formed a solid basis for family life. Bride and bridegroom took one another for richer for poorer, for better for worse, in sickness and in health, till death should them part.

What has been the course of things since the Reformation?

In Protestant countries the religious character of marriage has been sensibly weakened. Although the ceremony, in most of such countries, and notably in England, still usually receives ecclesiastical benediction, the tie is not to men's or even to women's minds primarily a religious tie. To most Protestants, the wedding service in church, or before a minister of religion, is rather an ornamental ceremony than essentially a sacred vow. The duties of the spouses are conceived of by them in a more or less worthy way, according to their respective religious and moral standards, but not generally, or at least seldom vividly, as a part of their duties towards God.

This is perhaps part of that general decline in the intensity of the feeling of sin which marks the Protestantism of our own time as compared with that of earlier centuries. I do not mean that people are any more sinful than they were—probably they are not.

They were sinful enough in the seventeenth century. But wrong-doing presents itself more frequently to all but the most pious minds rather as something unworthy, something below their standard of honour, something disapproved by public opinion, than as something which deserves the wrath of God, and affects their true relation to Him as their Father. Thus the element of sin in any breach, be it slight or be it grave, of conjugal duty, would seem to be less present to the conscience of the average husband or wife now than it was formerly, at least if we are to take the literature (including the theological literature) of former times, when set beside that of our own, to be any guide.

The inquiry how far any similar change has passed upon sentiment in Roman Catholic peoples would lead us far, nor am I competent to pursue it. The conception of sin itself is not quite the same thing to pious Catholics as it is, or was, to pious Protestants. But, broadly speaking, marriage doubtless retains to Roman Catholics, and to the Orthodox church of the East, more of a sacred character than it does to Protestants, and the change in this respect from the sixteenth to the nineteenth century is doubtless greater among Protestants.

XXI. Tendencies affecting the Permanence of the Marriage Tie.

In most countries, and notably in England and the United States, married women have obtained power over their own property, including their earnings, and are now less dependent upon their husbands for support than they were formerly.

In most countries married women have far greater personal independence than in earlier days. They can dispose of their lives as they please, and are permitted both by law and by usage an always increasing freedom of going where and doing what they will. For social purposes, they are in England (at least those who belong to the upper and middle classes are), and still more in the United States, though somewhat less in such countries as Germany and Sweden, entirely the equals of men, so that the retention of the promise to obey in the marriage service of the English Church excites amusement by its discrepancy from the facts.

Over and above these changes directly affecting the matrimonial relation, there are other changes which have modified life and thought. The old deference to custom and tradition, and therewith the stability of the social structure as a whole, have been weakened. Men move much more from place to place, so their minds have grown less settled. The habit of reading, and in particular the excessive reading of newspapers, may have produced a quickness of apprehension, but it has been accompanied by a measure of volatility and inconstancy in opinion. These in their turn have bred a liking for novelty and excitement, and have confirmed the disposition to question old-established doctrines. There is an increase, especially among women, of the things called 'self-consciousness' and 'nervous tension.' Both men and women are more excitable, and women in particular are more fastidious. Pleasures other than material are probably more appreciated, but the desire for pleasure, and the belief that every one has a right to it, seem to be stronger and more widely diffused than ever

before. Some will perhaps add that, in an age when the belief in a future state of rewards and punishments is less deep and less general than it once was, the desire to have out of this life all the pleasure it can be made to yield is naturally stronger; yet I doubt whether beliefs regarding a future life have ever influenced men's conduct so much as the whilom universality of those beliefs might lead us to assume.

All these tendencies are partly due to, and are certainly much increased by, that aggregation of population into great cities which makes one of the most striking contrasts between our time and the ages which formed English and American character. It is in industrial and progressive communities, such as those of Germany, Belgium, France, and England, that these tendencies are most pervasive and effective. They are even more pervasive and multiform in the United States than in Europe. It would be strange indeed if they did not affect the theory and the practice of domestic relations and the conception of the family. And their influence will evidently be greatest in the country where the ideas of democratic equality, and the notion that every human being may claim certain indefeasible 'human rights,' have struck deepest root.

The idea that men and women are entitled to happiness, and therefore to have barriers to their happiness removed, is strong in the United States, and has gone far to prompt both the indulgence of the laws and the over-indulgence shown in administering them. This idea has its good side. The fuller recognition of the right of women to develop their individuality and be more than mere appendages to men is one of the conspicuous gains

which the last two or three generations have brought. It has helped to raise the conception of what marriage should be, so we must expect to find that it has made women less tolerant of an unsympathetic or unworthy partner than they were in the eighteenth century.

It would not therefore be wonderful if, even apart from such facilities as legislation has allowed, and assuming that there was one and the same divorce law over all civilized countries, the United States should show, as Switzerland shows in Europe, an exceptionally high percentage of divorces to marriages. Newspapers are more read there than in any other country; and newspapers contain a great deal about matrimonial troubles which would be better left unpublished. The life of the middle class is more full of stir and change and excitement than it is in Europe. Both the process described as the emancipation of women, and the admission of women to various professions and employments formerly confined to men, have gone further there than in Europe. So has the carrying on of industries in factories instead of at home. So has the habit of living in hotels or boarding-houses.

All these conditions are less favourable than were the conditions of a century ago to the maintenance of domestic life on the old lines. And over and above these, there has come that extreme laxity of the law and of judicial procedure which has been already described. Thus we can easily account for the comparative frequency of divorce in the United States, while yet noting, for this is the point of real importance, that the phenomena of the United States are not isolated, but merely the most conspicuous instance of a tendency which is

at work everywhere, and which springs from some widely diffused features of modern life.

The points of similarity between the history of divorce at Rome and its history in recent times need not be further insisted on. There is, however, one to which I have not yet adverted. At Rome the increase of conjugal infidelity and that of divorce would seem, from such data as law and literature give us, to have gone on together, each fostering the other. Is there any like connexion discoverable now?

This is a question which it appears impossible to answer either generally or for any particular country. There are no statistics available, except for matrimonial causes coming into the Courts, and we can never tell what proportion the offences that are disclosed bear to those which remain hidden. There have been countries where the level of sexual morality was extremely low, at least among the wealthier classes, though no divorce was permitted. There may be countries where the very fact that the level is low keeps down the number of applications to the Court, because the injured party acquiesces and takes his or her revenge in like offences. Common talk, and literature which as regards the past may sometimes represent nothing more than common talk[1], are unsafe guides, as any one will see who asks himself how much he knows about the moral state of his own country in his own time. He can form some sort of guess about the character of the 'social set'

[1] Sometimes not even that. A few years ago, in the United States Senate, some one quoted, in order to prove the corruption of public life in England, a play represented there, in which a Secretary of State or his wife was involved in a disgraceful job connected with an Indian railway. Nobody in England had taken such a thing seriously enough to comment on the absurdity of it.

he moves in, but how little after all does he know about the classes above or below his own! Thus there can be very few persons in England whose means of information entitle them to say that the undoubted increase of divorce cases in our Courts since 1860 represents any decline in the average conjugal morality of the people. As regards the United States, I have heard the most opposite views expressed with equal confidence by persons who ought to have been equally well-informed. Judicial statistics do not prove that infidelity has become more common there, for the largest proportion of divorces granted is for desertion, 38·5 per cent. of the whole, those for infidelity being little more than half of that percentage, or about one-fifth of the whole. At the same time the smallness of this percentage may count for less than might appear, for it is probable that in States where divorce can be obtained for other grounds, less serious and easier to prove than infidelity is, petitioners will, where they have a choice of several charges to make, put forward a less grave charge provided it is sufficient to secure their object. So far as my own information goes, the practical level of sexual morality is at least as high in the United States as in any part of northern or western Europe (except possibly among the Roman Catholic peasantry of Ireland), and experienced judges in America have told me that, odious as they find the divorce work of their courts, the thing which strikes them in the cases they deal with is more frequently the caprice and fickleness, the irritability and querulous discontent of couples who have married on some passing fancy, than a proclivity to breaches of wedded troth.

Indeed, so far from holding that marriages are more frequently unhappy in the United States than in western Europe, most persons who know both countries hold the opposite to be the case. On the whole, therefore, there seems no ground for concluding that the increase of divorce in America necessarily points to a decline in the standard of domestic morality, except perhaps in a small section of the wealthy class, though it must be admitted that if this increase should continue, it may tend to induce such a decline.

The same conclusion may well be true regarding the greater frequency of divorce all over the world. There is no reason to think that sexual passion leading to conjugal infidelity is any commoner than formerly among mankind. More probably passion is tending to grow rather weaker than it was formerly. But that which we call Individualism, viz. the desire of each person to do what he or she pleases, to gratify his or her tastes, likings, caprices, to lead a life which shall be uncontrolled by another's will—this grows stronger. So, too, whatever stimulates the susceptibility and sensitiveness of the nervous system tends to make tempers more irritable, and to produce causes of friction between those who are in constant contact. Here is a source of trouble that is likely to grow with the growing strain of life, and with the larger proportion which other interests bear in modern life to those home interests which formerly absorbed nearly the whole of a woman's thoughts. It is temper rather than unlawful passion that may prove in future the most dangerous enemy to the stability of the marriage relation.

XXII. Influence of the Church and the Law.

The view of marriage as a tie which the parties intend to enter into for their lives, and which the law holds indissoluble, has hitherto rested not so much on any abstract theory or sentiment which men and women have entertained regarding it as upon the three authorities which have formed both sentiment and opinion. These three are the Church, the State, and Tradition, that is to say the beliefs which people adopt because they have come down from the past. The attitude of the Church has in Protestant nations sensibly altered. In some countries it altered in the sixteenth century. It has everywhere altered in the nineteenth. So, too, the support given to the old view by the State has in like manner become in those same countries much weaker, and in some countries, as for example in Switzerland and many American States, has almost disappeared. Public opinion has itself been largely formed by the Church and the Law, and may, when they have ceased to form it, be no longer an effective guardian of the permanence and dignity of marriage. In such democracies as those of the United States, the wish of an active minority to procure changes in the law easily prevails, because no one cares to resist, and because abstract principles suggest that the more everybody is permitted to do as he pleases, the happier everybody will be. When the law has been changed, public opinion, that is to say the opinion of the majority who do not think seriously about the matter, soon adjusts itself to the new law, and little social blame attaches to those who use

the licence which the law has granted. Seeing then how largely the law, whether of the Church or of the State, moulds the sentiment of the people on such a subject as this, and seeing that the Church no longer makes or administers law in Protestant countries, one may say that the civil law is practically left to keep their conscience. This tendency of the Church to abnegate its old functions makes the question of the way in which the Law should deal with divorce a question of critical importance[1].

As regards America, the opinion of the wisest and best informed people, though far from unanimous in points of detail, agrees in thinking that many States have gone too far in the way of laxity.

XXIII. Does the English Law of Divorce need Amendment?

In England the topic has been less discussed; yet there are some who hold that women ought to be placed on the same footing as men, and allowed to obtain a divorce from an unfaithful husband, even if he has not been guilty of cruelty. Others would go even further and admit other grounds as entitling either party to a dissolution of the marriage. The late Lord Hannen, whose opinion was entitled to exceptional weight, for he had presided over the English Divorce Court for many years with singular ability and fairness, told me that he thought the English law might with advantage be somewhat relaxed, so numerous were the

[1] Some of the Churches in the United States have however tried to deal with the matter. The Protestant Episcopal Church is at this moment (1901) considering a draft canon.

cases in which it was obviously best that a miserable marriage should be extinguished altogether. Yet the example of the United States (not to speak of Rome) suggests the danger of any but a very slow and cautious advance in that direction. Great as is the hardship of chaining an innocent to a vicious or drunken or brutal consort, the evil of permitting people to get rid of one another merely because they are tired of one another is no less evident. When the question is asked, 'What is the best divorce law?' the only answer can be, 'There is no good divorce law.' There are some faults in human nature which always have existed and apparently always will exist; and there is no satisfactory method of dealing with them. All that can be done is to choose between different evils.

Upon the whole, after weighing the considerations on both sides, the balance seems to incline to a change in the law which should not only equalize the position of the wife and the husband, by giving the former the same right to dissolution as the latter, but should also allow dissolution in cases of hopeless lunacy and of long-continued desertion.

Throughout this discussion it has been assumed that marriages ought to be permanent, and that obstacles should be thrown in the way of those who seek to dissolve them. It may be asked whether this assumption is justified. There is a school of thought, small perhaps, but of long standing and supported by a few eminent names, which insists that marriage should last no longer than love does; and therefore that the pair should, as in Rome, be permitted to separate with freedom of re-marriage, whenever they are no longer

held together by inclination. There is also a larger school, which feels so keenly the misery caused by ill-assorted unions as to think that the parties should be allowed to dissolve them, when certain terms for reflection and repentance prescribed by law have been completed.

I do not propose to argue afresh this question, for it has been often and copiously argued. Yet it is not a question to be dismissed without argument, for in our day no moral or religious dogma, however long established or widely held, is permitted to rest upon authority alone. But to argue it fully would draw us far from the historical inquiry we have been engaged on. It is enough to indicate in a word or two the main grounds which have in fact led the vast majority of thoughtful men to the assumption aforesaid. The first of these is the interest of children. Few things can be more harmful to the moral well-being of the offspring of a marriage than the divorce of their parents, which destroys one or other of the two best influences that work on childhood and may poison even the influence that is left. The next is the fact that, though it is professedly in the interest of suffering wives that facility of divorce is usually advocated, such facility tends to the injury of wives even more than of husbands, because men are, it would seem, more fickle and more prone to seek the dissolution of marriage when they are tired of their partner, or have formed some illicit connexion, or seek to marry some other woman. The third is that whatever weakens the conception of the marriage tie as a permanent one strikes at the whole character and essence of the marriage relation. It is

often said that when people know they have got to live together, they are forced to exercise the self-control necessary to enable them to live together. But the moral effect of the sense of permanence in wedded union goes deeper than this. It is in the complete identification of the two beings and the two lives that the true happiness of a happy marriage lies. The sense that each has absolutely committed himself or herself to the other—each taking charge of the joys and sorrows and hopes of the other, each trusting to the other his or her joys and sorrows and hopes—gives to the relation an incomparable sanctity, and makes the strongest possible appeal to the best feelings of each. If selfishness and falsehood can be overcome by anything, it is by calling into action the sense of obligation to fulfil this trust which the enduring nature of the union is calculated to inspire. Were the union to cease to be thought of as enduring, were it to be in the minds of the parties, as their minds are moulded by the practice and the prevailing notions of society, merely the result and expression of a possibly transient passion, or of the willingness to try the experiment of a joint household, the sanctity and the sense of obligation would receive an irreparable blow.

Thus we are driven to the conclusion that numerous as the cases may be in which, if one looked only at the wretchedness of the parties to an ill-assorted union, one might desire to see that union dissolved, more harm than good may on the whole result from permitting the parties to dissolve their union at their pleasure, as the later Romans did, as the French did during the Revolution, and as some American States practically do to-day;

and more harm than good may result even from extending in large measure the opportunities for divorce which the law of England or that of Scotland at this moment affords.

How vital to the future of humanity are the interests involved is admitted on all hands by those who would change, as well as by those who would uphold, the conception of marriage as a permanent relation. Great as is the contrast between that sensual and unworthy view which finds its expression in the polygamy of the East and the view which Christianity has formed among Western peoples, it is hardly greater than that which exists between the view of marriage as a life-union, dissoluble only when infidelity has shattered its basis, and the view which puts it at the mercy of the caprice of a volatile nature or the temper of an irritable one. Polygamy has been and remains a blighting influence on Musulman society, and on the character of individual Musulmans. So if marriage were to become a transitory relation, as it practically was among the upper classes in the Roman Empire, the effects upon family life and on the character of men and women would in the long run be momentous.

XXIV. Some General Reflections: Changes in Theory and in Sentiment regarding Marriage.

A few words more to sum up the general result of our survey. We have seen that the relations of the wife to the husband have been regulated sometimes by one, sometimes by the other of two systems, which have

been called those of Subordination and Equality[1]. In all countries custom and law begin with the system of Subordination. In some, the wife is little better than a slave. Even at Rome, though she was not only free but respected, her legal capacity was merged in her husband's.

This system vanishes from Rome during the last two centuries of the Republic, and when the law of Rome comes to prevail over the whole civilized world, the system of Equality (except so far as varied by local custom) prevails over that world till the Empire itself perishes.

In the Dark Ages the principle of the subordination of the wife is again the rule everywhere, though the forms it takes vary, and it is more complete in some countries than in others. It was the rule among the Celtic and Teutonic peoples before they were Christianized. It finds its way, through customs conformable to the rudeness of the times, into the law of those countries which, like Italy, Spain, and France, were only partially Teutonized, and retained forms of Latin speech. It holds its ground in England till our own time, though latterly much modified by the process which we call the emancipation of women, a process which, under the influence of democratic ideas, has moved most swiftly and has gone furthest among the English

[1] By Equality I do not mean any recognition of Identity or even Similarity as respects capacity and practical work (though the tendency is in that direction), but the equal possession of private civil rights and the admission of an individuality entitled to equal respect and an equally free play of action. Such Equality is perfectly compatible, given sufficient affection, with a complete identification of the consorts in the harmony which comes of the union of diverse but complementary elements.

race in North America. But in our own time the principle of equality has, in most civilized countries, triumphed all along the line, and so far as we can foresee, has definitely triumphed. One must imagine a complete revolution in ideas and in social habits in order to imagine a return to the system of Subordination as it stood two centuries ago.

As there have been two systems determining the relations of husband and wife in respect of property and of personal control, so also have there been throughout all history two aspects of the institution of marriage, one in which the sensual and material element has predominated, the other in which the spiritual and religious element has come in to give a higher and refining character to the relation. In this case, however, it is not possible to make the relative importance of these two aspects synchronize with the general progress of civilization, nor even with the elevation of the position of women. It is true that among barbarous and some semi-civilized races the physical side of the institution is almost solely regarded, and that we may suppose a remote age when primitive man was in this respect not much above the level of other animals. But there have been epochs when civilization was advancing while the moral conception of marriage, or at any rate the popular view of marriage as a social relation, was declining. The tie between husband and wife in the earlier days of Rome was not only closer but more worthy and wholesome in its influence on the lives of both than it had become in the age of Augustus. Christianity not only restored to the tie its religious colour, but in dignifying the individual soul by proclaim-

ing its immortality and its possibility of union with God through Christ gave a new and higher significance to life as a whole, and to the duties which spring from marriage. The greatest advance which the Christian world made upon the pagan world was in the view of personal purity for both sexes which the New Testament inculcated, a view absent from the Greek and Italian religions and from Greek and Latin literature, though there had been germs of it in the East, where habits of sensual indulgence more degrading than those of the West were opposed by theories of asceticism, which passed into and tinged primitive and mediaeval Christianity.

The more ennobling view of love and of the marriage relation held its ground through the Middle Ages. There was plenty of profligacy—as indeed the ideal and the actual have never been more disjoined than in the Middle Ages. But in spite of profligacy on the one hand, and the glorification of celibacy on the other, and notwithstanding the subjection of women in the matter of property and even of personal freedom, the conception of wedded life as recognized by the law of the Church and enshrined in poetry remained pure and lofty. That the Reformation took away part of the religious halo which had surrounded matrimony may be admitted. Whether this involved a practical loss is a difficult question. It may be that, in their anxiety to be rid of what they deemed superstition, and in their disgust at the tricky and mercenary way in which ecclesiastical lawyers had played fast and loose with the intricate rules of canonical impediment, the Reformers of Germany, Scandinavia, and Scotland forgot

to dwell sufficiently on the fact that though marriage is a civil relation in point of form and legal effect, it ought to be, to Christians, essentially also a religious relation, the true consecration of which lies not in the ceremonial blessing of the Church, but in the solemnity of the responsibilities it involves. Yet it is not clear that, in point of domestic happiness or domestic purity, the nations which have clung to the mediaeval doctrine stood a century ago, or stand now, above those which had renounced it. General theories regarding the influence of particular forms of religion, like theories regarding the influence of race, are apt to be misleading, because many other conditions have to be regarded as well as those on which the theorist is inclined to dwell.

Whoever regards the doctrines of the Roman Catholic Church respecting marriage and realizes her power over her members will expect to find a higher level of sexual morality in Roman Catholic countries than he will in fact find. So on the other hand will he be disappointed who accepts that view of the superiority in social virtues of peoples of Teutonic stock which finds so much favour among those peoples, for dissolutions of the marriage tie have latterly grown more frequent than they formerly were among Protestant and Teutonic nations, and are apparently less condemned by public opinion than was the case in older days.

The material progress of the world, the mastery of man over nature through a knowledge of her laws, the diffusion of knowledge and of the opportunities for acquiring it, are themes which ceaselessly employ

the tongues of speakers and the pens of journalists, while they swell with pride the heart of the ordinary citizen. But they are not the things upon which the moral advancement of mankind or the happiness of individuals chiefly turns. They co-exist, as the statistics of recent years show, with an increase over all, or nearly all, civilized countries of lunacy, of suicide, and of divorce.

XVII

INAUGURAL LECTURE[1]

THE ACADEMICAL STUDY OF THE CIVIL LAW

NARROW as is the sea that parts England from the continent of Europe, it has cut her off as effectually from many continental influences as if she lay far out in mid-Atlantic. When it is considered how close are our affinities of blood with the Low-German races, and how intimate during the Middle Ages were our relations, intellectual as well as political, with the whole of Western Europe, the individuality of the English people and its institutions appears singularly well-marked; and one is surprised to see in how many points the great nations of the continent resemble one another and understand one another, while all alike differ from us, and are comparatively incomprehensible to us. This strangeness of England is what most strikes the foreigner who comes among us; be he Frenchman, German, Spaniard, or Italian, he seems less at home in England than anywhere else in Christendom. As in the woodland wealth of our country, as in the architecture of our towns and the structure of our houses, so also in the social usages and mental habits of Englishmen one discovers something peculiar, something bearing witness to a prolonged isolation, to an exemption from those influences, speculative as well as practical, which have operated on all

[1] Delivered at Oxford, February 25, 1871, on entering on the duties of the Regius Professorship of Civil Law.

or nearly all the other members of the European commonwealth.

Such isolation has been in no respect more marked or more fruitful in results than in the case of our law. In spite of the immense power of the mediaeval church, in spite of the influence of the universities, and of the strangers who flocked to them from all quarters, the Roman jurisprudence exerted a comparatively slight influence upon the technical development of our law and the formation of our habits of legal thought. Here, where the language, and to a great extent the customs of the people, were of Teutonic origin, it found a less congenial soil than in Italy or France, while there were no such political associations with the Roman name as those which gave the Corpus Juris its authority in Germany. Whatever be the cause, it is clear that Roman law was never thoroughly domesticated in England. True it is that one of the first notices we have of the existence of our University is that which mentions the Lombard Vacarius as lecturing on law (doubtless on the Digest of Justinian) at Oxford, under the patronage of Archbishop Theobald, in the days of King Stephen[1]; and there is abundant evidence that the study was regularly pursued there down till and in the sixteenth century. The statutes of the older colleges make provision for some of the fellows proceeding to degrees in law; and indeed the only law degrees Oxford has given, since those in canon law were abolished by King Henry the Eighth, have been degrees in civil law. But the customary or common law, unrecognized in the universities, gained exclusive possession of the seats of legal study in London. That hostility to the pretensions of the foreign laws which had been so forcibly expressed by the barons at

[1] 'Oriuntur discordiae graves, lites et appellationes antea inauditae. Tunc leges et causidici in Angliam primo vocati sunt, quorum primus erat magister Vacarius. Hic in Oxenefordia legem docuit, et apud Romam magister Gracianus et Alexander, qui et Rodlandus, in proximo papa futurus, canones compilavit.'—(Gervas. Dorob.; *Act. Pontif. Cantuar.; Theodbaldus.*)

Merton in Henry the Third's time, and again by the Parliament of Richard the Second, maintained ever after a watchful and jealous attitude. Persons who had mastered Roman law at Oxford were obliged, when they practised in the courts at Westminster, to disguise or disclaim any appeal to its authority; and when the Reformation finally broke the link between England and Rome, and in doing so loosened the ties that bound English men of letters to the general movement of European learning and thought, the study of the canon law virtually expired among us, while that of the Civil Law maintained only a feeble and flickering life [1]. Its practical utility (except to practitioners in the ecclesiastical courts) was apparently at an end; and in the cloud of dullness and sluggishness that settled down upon Oxford and Cambridge at the end of the seventeenth century, it only shared the fate of other studies which had as much to commend them to an active and curious intellect. A few distinguished publicists and lawyers, such as Arthur Duck, Selden, Hale, Holt, and those two brightest ornaments of the English bench, Lord Hardwicke and Lord Mansfield, were well versed in its rules, but the great mass of English lawyers regarded it with suspicion and dislike, and the very praise which Hale bestows testifies to the slight interest felt in it. 'He set himself much,' says Bishop Burnet his biographer, 'to the study of the Romane law, and though he liked the way of judicature in England by juries much better than that of the civil law, where so much was trusted to the judge, yet he often said that the true grounds and reasons of law were so well delivered in the Digests, that a man could never understand law as a science so well as by seeking it there, and lamented much that it was so little studied in England.'

The ancient rivalry of the Civil and the Common law proved eventually the cause of mischief to both. Having reigned

[1] For some time after the breach Englishmen used to resort to continental universities, and there, of course, they found Roman law taught; but this practice died out before very long.

supreme in the universities, the civil law had never taken root in the Inns of Court, and when it fell in the universities it fell utterly. On the other hand, the common lawyers, whose study was originally not recognized in Oxford or Cambridge, were well enough content with the position they had obtained for it in London, and do not seem to have seen how much was to be gained by introducing it into the ancient seats of learning. Thus both systems, to the loss as well of the profession as of the universities, came to be neglected in the very places where they might best have been cultivated in a philosophical spirit; and it was not until Mr. Viner founded his Chair in A. D. 1756 that English law was recognized in Oxford as an academic study, while in Cambridge no provision was made for the teaching of it until the beginning of the present century.

That isolation of England to which the neglect of the Civil Law may be ascribed has of late years perceptibly diminished. Owing partly to the more frequent and easy intercourse which improved means of communication have produced, partly to the removal of old national prejudices, partly to that increased recognition of the power of ideas which is commonly associated with the growth of democracy, civilized Europe has within the last eighty or ninety years become much more of a single intellectual commonwealth than it has been at any time since the Reformation, perhaps, indeed, since the fall of the Roman Empire. The long-standing jealousy of the Civil Law as a foreign system, associated with the overweening pretensions of emperors and popes, has at last vanished. A century ago this feeling was still so active, that Lord Mansfield's enemies found it worth while to charge him with having, as a Scotsman, an undue partiality for the Roman law, and designing, by means of its despotic principles, to sap the liberties of Englishmen—'corrupting by treacherous arts the noble simplicity and free spirit of our Saxon laws;' though as a matter of fact, Lord Mansfield left Scotland at the age of three, and the use which he made of his knowledge

of Roman jurisprudence was made by applying its rational principles to the elucidation of the civil, and indeed chiefly of the commercial parts of the English system. Such prejudices seem now to lie far behind. We live in the midst of a general unsettling of respect for whatever exists, which does not spare the laws or even the constitution of England, and welcomes new ideas from every quarter. Thus the influence of the great German civilians begins to tell upon English students, while the rise of a vigorous historical school in England has quickened our curiosity in whatever helps to explain the ancient and the mediaeval world. The feeling so awakened has happily coincided with an interest in the scientific amendment of the form of English law, different from that desire to improve and correct its substance of which Bentham was the first exponent, and which inspired the labours of Romilly and Brougham.

The efforts of these great men were chiefly directed to the removal of harsh enactments, of rules due to economic errors, and of technicalities which defeated the ends of justice. Their modern successors, finding the law purged of its grosser faults, are rather concerned with its reduction into a more orderly and systematic shape. The three leading questions of reform at this moment are questions of form, relating not so much to substance as to the shape and form which the law ought to take. What are the best means of fusing legal and equitable procedure [1]? How may Acts of Parliament be drawn more concisely and symmetrically? How are we to frame, out of the vast and chaotic mass of our reported cases and statutes, an organized body of rules, a Digest or a Code? Finding themselves thus brought face to face with the problem which Justinian partially solved, and which several modern states, as notably France, Austria, Prussia, and Italy have again had to solve [2], English lawyers

[1] This was effected by the Judicature Act of 1873.

[2] To these one may now add the new German Empire, which was coming into being when this Lecture was delivered in A.D. 1871. A Civil

are being driven to examine the means whereby codification was accomplished, and the results that followed it. They feel that for the execution of so great a work men are needed who have had something more than an empirical training, and are disposed to believe that in any systematic course of legal history and philosophy which might be devised to form the mind of the jurist as preliminary to his purely professional studies, a chief place should be assigned to the study of the Roman law. Thus, what with our own actual needs, what with the influence of the scientific spirit of the Continent, there has been awakened in England an interest in the Civil Law and an estimate of its worth which, although still matter rather of faith than of sight, is yet strong enough to give the University of Oxford not merely a motive for endeavouring to revive the study, but a reasonable hope that it may be revived with success, to the substantial benefit as well of the universities themselves as of the legal profession.

To prove that Roman law does deserve in England, and especially from the University, more attention than it now receives may well be thought, at least in Oxford, a spot which was long its home, a superfluous labour. That it fills so large a place in the world's history, that it is the fruit of so great an expenditure of human genius and industry, is of itself a sufficient reason why it should engage the labours of a learned body which has, in Bacon's words, taken all knowledge to be its province. I may therefore content myself with touching upon some of the purposes which the study may be made to serve, and indicating some of the directions in which it may most usefully be pursued; premising always that academical study has two objects, the furtherance of learning and discovery, and the preparation of young men to be, not merely useful and active in their future occupations, but also, in the widest sense of the word, good citizens. These two objects have been sometimes,

Code for the Empire began to be prepared in 1872 and came into force in 1900.

under the names of Research and Education, opposed to one another, and no small controversy has been maintained touching their respective claims. Are they not in truth closely intertwined? since the greater the zeal wherewith a study is pursued, so much the greater is the teacher's influence on the taught; and since experience shows that when the work of education has been neglected by schools and universities, such neglect has not been caused by any absorption in abstract studies, but by mere dullness and self-indulgence, as fatal to study as they can be to education.

The various utilities of a knowledge of the Roman law fall into two classes: those which connect it with the liberal studies of a university, and specially with classical philology, with history, and with ethics; and those which belong rather to the faculty of law, and entitle it to a place in a strictly professional curriculum.

Taking the former of these heads first, there is no more obvious reason for pursuing the study than the light which it throws upon Roman history, which is, it can hardly be too often repeated, substantially the foundation of all modern European history. No people was ever so thoroughly permeated by legal ideas as were the Romans; none rated the dignity of the profession so high, spent so much pains in the elaboration of legal rules, and formed, let it be added, so worthy a conception of what law ought to be. Hence the whole political history of the Roman people and state is so involved with its legal institutions, that it can be understood only when regarded as derived from and conditioned by them. This is signally true not only of the regal and earlier republican period—in all early states of society, legal customs do for a people what a political constitution does in later times, or, in other words, public and private law are closely intertwined—it is true also of the republic in the days of Sulla and Julius Caesar, and of the long period of the Empire. Most of the constitutional arrangements of the Roman state depended upon those of private law, and many

of the gravest political questions turned upon legal doctrines. The subject of the Agrarian laws, for instance, is intimately involved with the legal conception of possession, as distinct from ownership, and can hardly be mastered without a knowledge of technical theory. The structure of the *gens*, the nature of the agnatic tie and of the *patria potestas*, the judicial character of the chief administrative magistrates, the doctrine of adoption—all and each of them exerted a powerful influence on the political fortunes of Rome. Adoption, for instance, became from time to time under the Empire the means of working a system of appointment to the sovereign power, which could show the merits without the evils of hereditary succession. I forbear to dwell on the number of historical incidents, like that of Virginia and Appius Claudius, or of allusions in poetical and philosophical writers, such as those which every scholar remembers in Horace, Ovid, Juvenal, and most of all in Cicero, which only a knowledge of the civil law can elucidate. A student of the classics need not read the Corpus Juris merely for the sake of understanding these, any more than one is bound to read Coke or Hale for the sake of better seeing the point of the numerous legal phrases in Shakespeare. Few would go so far as the enthusiastic civilian who maintained that every divine ought to learn Roman law, because there are passages in the New Testament which a knowledge of it serves to explain. But, though every scholar need not, some scholars certainly ought; for there is much in the literature, and, indeed, in the literary spirit and feeling of the Romans, which is due to legal influences, and which can be fully apprehended and expounded by those only who have made themselves familiar with these influences in their source. In particular, such study is necessary in order to appreciate the character of the Empire in its relation to the peoples of the Mediterranean whom it embraced. Rome's great gift to the world was her jurisprudence; and the most interesting chapter in her history is that which traces, coincidently with the gradual extension of Roman

citizenship and Roman law to the subject races, the steady amelioration in its positive rules, and its development from a harsh and highly technical system into one grounded on principles of reason and justice, principles which are indeed common to all civilized peoples, but which the Roman jurists were the first to expound and apply. To this great work was devoted, from the time of Augustus onwards, nearly all the genius and labour, not of Rome merely but of the Roman world, which was not expended on abstract speculation; and it is more than an accident that long after the language of Virgil and Cicero had become debased in the hands of florid rhetoricians and soulless versifiers, its purity and its nervous precision were preserved in the hands of men like Papinian and Modestinus.

A second utility which may be claimed for our study, is its bearing upon the history of mediaeval and modern thought. When the Western Empire perished amidst the storms of the fifth century, its law did not perish with it, but remained a chief factor in European history, more widely, although less directly, influential. The barbarian conquerors, who brought with them only the rude customs by which they had lived in their native forests, soon felt the need of a regular legal system, and were glad to recognize that which they found subsisting. They allowed their subjects, the Latin-speaking provincials, to use it; in some countries they came to use it themselves; parts of it were collected and published in such compilations as the Breviarium of the West Gothic Alarich the Second and the Lex Romana Burgundionum. At the close of the Dark Ages, the study of the original texts revived, first in Italy, then in France, England, and Spain. Schools of law arose all over Europe. Immense pains were spent on the interpretation of the Digest, and it became thenceforth, for many generations, the foundation of the education and a principal part of the knowledge of every lawyer and publicist. As the mighty fabric of ecclesiastical power grew up, it created with the help of Roman materials its own

body of laws, varied of course by the nature of the subjects, and coloured by religious ideas, but substantially Roman after all. In this, as in so much else, the Papacy was, to use the forcible expression of Hobbes, 'the ghost of the old Empire, sitting on its tomb and ruling in its name.' And thus, in the hands of the very ecclesiastics who forbade its study, as hostile to their own pretensions and favourable to those of their antagonist, the Emperor, the doctrines of the Civil Law obtained a wider range than ever before. As its continued existence was one chief cause of the fantastic belief in the continued life of the Roman Empire, so that very belief became in turn the cause of its ultimate reception, in Germany, where it had not prevailed, no less than in Italy, where it had prevailed continuously, as effective and binding law. Being studied by all the educated men, the poets, the philosophers, the administrators of the Middle Ages, it worked itself by degrees into the thought of Christendom, losing the traces of its origin, as it became part of the common property of the world. A knowledge, therefore, of what it was, and of how it influenced mankind, helps to explain much which might otherwise have remained obscure in the literature of the Middle Ages and the Renaissance—much whose bearing a modern finds it hard to grasp, just because law holds a different place in his conceptions, and because he does not realize the power it exerted over untrained and uncritical minds. Theology is an instance, but by no means the only instance, of a branch of inquiry over which legal notions once exercised a sway they have now lost.

The Middle Ages had received from antiquity, besides the Scriptures, only three bodies of literature containing systematized thought—the Church Fathers, the philosophy of Aristotle, known through translations, and the Roman law. The last counted for less than the two former in moulding ideas. But it counted for a great deal.

The history of law and of the evolution of legal concep-

tions, although in one aspect a professional subject, may also claim to be regarded as a branch of general academical study. Within the last few years, the application to it of the comparative method of inquiry has given it a new significance and interest, has enabled it to teach us much respecting the structure of primitive society, and has made it the means of illustrating many curious phenomena in the philosophy and politics of more recent times. Now to the student of legal history a knowledge of Roman Law is indispensable: first, because it was an independent system, uninfluenced by any preceding one, save to some slight extent by the customs of Greek cities, whereas all subsequent European systems have been influenced by it; and secondly, because it alone presents an uninterrupted continuity of development, stretching over ten centuries from the Twelve Tables to Justinian, and later still through the dynasties of Constantinople. No sudden intrusion of a new element, like that caused in England by the Norman Conquest, nor even the internal strife which altered the form of the Roman state, disturbed that equable and self-consistent expansion and amendment of the laws of Rome, which the widening relations of the city, as a commercial, a conquering, a world-embracing community, made necessary. Legislative power passed from the patrician curies to the popular Assemblies of the nation, from the Assemblies to the Senate and the Emperor, but the conduct of legislation remained in the hands of an educated profession, and the harmonious evolution of principles was not interrupted. Nearly all the phenomena which the history of law in other countries presents, find their parallel and explanation in the history of its growth at Rome: nor is the study without a practical value for the modern legislator. The nature and limits of the jurisdiction of our own Court of Chancery are better understood when compared and contrasted with the functions exercised by the Praetor as exponent of the *ius gentium*. The codification of Justinian has been constantly cited, and occasionally

examined, in recent discussions respecting the propriety and the methods of digesting and codifying English law.

Assuming, without further argument, the claims of the Civil Law to be recognized among the general liberal studies of the University, I may proceed to consider its special utility to the lawyer, and the reasons for giving it a place among the studies of the legal faculty. Some zeal has of late been shown for the revival of such studies in England and in Oxford; and it will be generally admitted that young lawyers ought to be more regularly instructed in the science and art of their profession than they are now; that much of this instruction may be, and ought to be, given at the University; and that, apart altogether from the service to be rendered by teaching, it would be a gain to the country if law were cultivated and written upon at the Universities, in the same philosophical spirit, and with the same systematic fullness, as in the schools of Germany. There a great writer is often also a great teacher. Such were Savigny and Thibaut; such was that illustrious man whom Heidelberg lost five months ago[1]—a man whose learning was so vast and well-digested, whose expositions of law were so penetrating and luminous, so philosophical in method, so eloquent in language, so animated in delivery, that to have listened to him was to have gained a new conception of the power of oral teaching.

An obvious ground for cultivating it, and one likely to have weight with the practising lawyer, is the immense influence it has exerted on the jurisprudence of modern Europe. As respects England, this influence is matter rather of antiquarian interest than of practical utility. Much of our law, especially of our mercantile law, and of that which is administered in courts of equity, may indeed be traced to a Roman origin; while the Court of Admiralty, and even to some extent, the probate and matrimonial Courts which have now replaced the ancient ecclesiastical tribunals, owe a more direct allegiance to the imperial jurisprudence. In the words

[1] Dr. K. A. von Vangerow.

of Lord Chief Justice Holt, 'Inasmuch as the laws of all nations are doubtless raised out of the ruins of the Civil Law, as all governments are sprung out of the Roman Empire, it must be owned that the principles of our law are borrowed from the Civil Law, and therefore grounded upon the same reason in many things[1].' But the bulk of English law is so vast, requiring so much labour to master it, and that which it has borrowed from other systems is now so thoroughly transformed and Anglicized, that one cannot honestly advise the student, on the mere ground that in some departments it has drawn freely from Roman sources, to spend time in examining those sources, instead of going straight to English text-books. It is not so much because English law is like Roman, but because it is unlike, that the study is really to be recommended. Similarities, whatever their historical origin, are usually found to rest on that wish to follow reason and to secure what is practically convenient, which have moulded the rules of all highly finished systems. They need no further explanation. But dissimilarities suggest difficulties. Inquiry is provoked; reflection is stimulated; ideas emerge which may prove fruitful.

A lawyer who loves and appreciates his subject will hardly be content without knowing something of the rules and doctrines which prevail in other nations; and a man in brisk practice will find many occasions in which a knowledge of foreign or colonial law is of great value to him. Now in the acquisition of almost any foreign system of law, a knowledge of the outlines of the Civil Law renders the same kind of service which a knowledge of Latin renders in the acquisition of one of the Romance languages; and just as one would advise a man who desired to learn French Spanish and Italian to begin by learning Latin, so the shortest way to know something of German Dutch and French law is to study the principles of the Civil Law, which are a master-key to that of all these countries. The House of Lords in Scotch appeal

[1] 12 Mod. 482.

cases, the Privy Council in appeals from many of our colonies, as, for instance, from Lower Canada, British Guiana, the Cape, and Mauritius, administer a modified Roman law. And as the doctrines of international law are in their source Roman, they can be best understood and applied by one who is familiar with them in their original form as drawn from that imperial law which, when they first sprang up, was still dimly conceived of as extending its authority over all the states of Christendom.

I have placed last what I venture to believe to be the weightiest practical reason for pursuing this study, although, at the same time, that reason which it is most difficult to expound and establish—its educational and scientific worth as forming and strengthening those habits of mind in the possession of which a lawyer's excellence consists. In proof of this worth it is not sufficient to cite the examples of Germany, France, and Scotland, where the education of a legal practitioner is based upon the civil law; for the Corpus Juris is in all these countries the foundation of their municipal systems, while in Scotland and some parts of Germany, it is to some extent actually still in force. The reason which we in England have for urging that the study of Roman law should precede and accompany that of the law of our own country, must be sought in a perception of the defects, certainly obvious enough, of modern English jurisprudence. Here it is necessary to distinguish what laymen, and even lawyers, have often confounded—defects of substance and defects of form. Now, in point of substance, the English law is, with the exception of certain provisions of the law of real property, and of the law relating to married women—provisions which the progress of political change seems likely to remove—no whit inferior to any other body of law; almost always fair and reasonable, conformed to the dictates of good sense, reflecting worthily the free and flexible spirit of our political institutions, and offering as few opportunities as may be to fraud and oppression. Its processes are of course

technical, perhaps still too technical, and they are sometimes needlessly circuitous[1]; but, as a technical hardship may usually be met by a technical remedy, substantial justice seldom fails to be attained. With some cumbrousness, our procedure has the merit of variety and flexibility; and it is our especial honour to have worked out the method of trial by jury with a completeness unrivalled elsewhere, and to have alone (for in this, as in many other respects, Americans may practically be reckoned as Englishmen) succeeded in applying it to large classes of civil causes. But when English law is regarded in its formal and scientific aspect, as a system, the opinion formed of it must be very different. It is, in fact, not so much a system as a huge mass of isolated positive rules; some laid down, with little statement of a reason, for the sake of meeting a particular case; some deduced by the judges, though in a rather occasional and fragmentary way, from principles which were at first dimly and incompletely apprehended; some, again, created by statutes which have, especially of late years, cut across these pre-existing principles and rules in an irregular and reckless way. Just as lines of railway have been driven through modern London without regard to the old arrangement of the thoroughfares, and have crossed and recrossed streets and squares, effacing parts of them till perhaps only a house or two is left standing, so Acts of Parliament, drawn up to meet the exigency of the moment, have paid no respect to the symmetry, such as it was, of the common law, and, instead of attempting to mould and reconstruct it, have laid down new positive rules which infringe upon, or almost wholly destroy, its ancient principles, by removing from their operation large and heterogeneous classes of cases. The effect of this has been to make the old principle no longer really a principle, but a positive rule in the cases not affected by the statute; and thus, as the number of enactments and positive rules increases, the value of principles declines, and the confusion grows

[1] This defect was removed by the Judicature Act of 1873.

every year worse confounded. So it comes, owing partly to the way they have been produced, and partly to the way they have been amended, that the rules of our law are an aggregate of dicta on points of detail—dicta which with difficulty can be reduced to a reasonable number of leading doctrines. For not only do the exceptions to a rule frequently outnumber the cases which it governs, but it often happens that judicial decisions, or the words of an Act, have provided for many cases which naturally fall under and suggest a general principle, but have never ventured to enunciate the principle itself, which cannot therefore be laid down as being part of the binding law. Hence the tendency of an English practitioner is by no means towards a search for principles: indeed, he becomes absolutely averse to them; and the characteristic type of excellence which the profession has delighted to honour is the so-called 'case lawyer,' who bears in his memory a great stock of particular decisions, from which he can, as occasions arise, select that one whose facts most nearly approach the individual case upon which he is required to argue or advise. Such a practitioner may acquire a sort of instinct which will usually keep him right, but may be unable to state the general doctrines on which the solution of a class of cases depends.

The strain thus imposed on the memory is such that many persons succeed in mastering only some special department of the law; and even our most eminent counsel, men of the greatest powers of mind, may be heard to confess that they do not pretend to know our law as a whole, but must rest content with knowing where to find what they want as they may happen to want it. For the same reason our text-books are, with few exceptions, not systematic expositions of law, but mere heaps of cases from which, by the aid of an index, the practitioner must try to pick out a few resembling, or, as lawyers say, 'on all-fours with,' that set of circumstances whose legal character he is called upon to determine. They are, therefore, unfit to be put into the hands of a beginner.

The result of all this is to make the process of learning English law very slow and somewhat distasteful. Certain persons indeed there are who, having no feeling for symmetry, are willing to pick up their knowledge by scraps and morsels, and who, so to speak, roll themselves about in cases in the hope that bits of legal knowledge will stick. But minds of finer temper, minds trained by their University studies to ask for a reason, seek out a principle, group things together under their natural relations, are disheartened by this chaotic state of matters, make slow progress in the study, find themselves required to unlearn their best mental habits, and sometimes abandon the profession in disgust. I remember having been told by a very distinguished and able member of this University[1], that when he began to read in a conveyancer's chambers he found his previous classical and philosophical training, so far from helping him, prove a positive hindrance and stumbling-block. This was seen to be an evil so long ago as Sir William Blackstone's time. In his introductory lecture as Vinerian Professor, delivered here in A.D. 1758, he says :—

'We may appeal to the experience of every sensible lawyer whether anything can be more hazardous or discouraging than the usual entrance on the study of the law. A raw and unexperienced youth, in the most dangerous season of life, is transplanted on a sudden into the midst of allurements to pleasure, without any restraint or check but what his own prudence can suggest; with no public direction in what course to pursue his inquiries; no private assistance to remove the distresses and difficulties which will always embarrass a beginner. In this situation he is expected to sequester himself from the world, and by a tedious lonely process to extract the theory of law from a mass of undigested learning; or else, by an assiduous attendance on the courts, to pick up theory and practice together, sufficient to qualify him for the ordinary run of business. How little, therefore, is it to be wondered at, when we hear of so frequent miscarriages; that so many gentlemen of bright imaginations grow weary of so unpromising a search, and addict themselves wholly to amusements, or other less

[1] Now (1901) one of the Law Lords sitting in the House of Lords.

innocent pursuits; and that so many persons of moderate capacity confuse themselves at first setting out, and continue ever dark and puzzled during the remainder of their lives.

'The evident want of some assistance in the rudiments of legal knowledge has given birth to a practice which, if ever it had grown to be general, must have proved of extremely pernicious consequence. I mean the custom, by some so very warmly recommended, of dropping all liberal education, as of no use to students in the law, and placing them in its stead at the desk of some skilful attorney, in order to initiate them early in all the depths of practice, and render them more dexterous in the mechanical part of business. A lawyer thus educated to the bar will find that he has begun at the wrong end. If practice be the whole he is taught, practice must also be the whole he will ever know; if he be uninstructed in the elements and first principles upon which the rule of practice is founded, the least variation from established precedents will totally distract and bewilder him: *ita lex scripta est* is the utmost his knowledge will arrive at; he must never aspire to prove, and seldom expect to comprehend, any arguments drawn *a priori* from the spirit of the laws and the natural foundations of justice[1].'

Blackstone is here founding, on the unfortunate results of the usage of his own time, an argument for making the future barrister begin with a systematic theoretical study of English law. His reasoning will be generally felt to be sound, but it does not exclude the further improvement of giving the learner some knowledge of the principles of Roman law before he addresses himself to English. I shall state some grounds for thinking that what might appear the longest way round, through Roman law, may really be the shortest way to the scientific mastery of our own.

It is clear that no knowledge of the Roman system can be a substitute for a knowledge of the English; but the difficulties which the English presents to a beginner are such

[1] Although it is the custom of placing a youth (untrained in theory) in an attorney's office to learn practice which Blackstone is here condemning, the spirit of his concluding remarks is almost equally applicable to the present usage of entering a conveyancer's or pleader's chambers before one has gained any systematic knowledge (or indeed any knowledge whatever) of the law.

as to suggest the utility of a preliminary legal training which may render it more comprehensible and less distasteful. Now, the conspicuous merit of Roman law is, that it is clear and intelligible. It is a system instead of a mere congeries of rules and dicta, a system which, although it cannot be exhausted by the labour of a powerful intellect during a long life, may be mastered in its outline and leading principles in six or eight months of properly-directed industry. A philosophical mind is attracted by its symmetry; the taste is pleased by the graceful propriety of its diction; the learner's interest is kept awake by watching the skill and subtlety wherewith its technical rules are manipulated and kept in harmony with the dictates of equity and common sense. The number of dominant conceptions which it is necessary to acquire is so small, and these conceptions themselves so rational and, so to speak, natural, that it does not take long to obtain a general view of the whole, and discern the harmonious relation of its parts. The student finds the ethical and historical knowledge he has already acquired serviceable in this new field. He learns to regard law as a science, closely related to ethics, and to be dealt with in a philosophical spirit. And thus, when he passes on to the study of our English law, he finds himself the better able to grapple with its bulk and its want of arrangement, since he has already mastered the leading conceptions of jurisprudence in their concrete (which is, after all, their only serviceable) form, and knows how to arrange under appropriate heads the positive rules which it will be his business to remember and apply. So valuable is this experience, that I dare affirm that a youth who spends some eight months in the study of the Civil Law, and then proceeds to that of English law, will, when at the end of three years he is measured against his contemporary who has given exactly the same amount of time and pains to English law alone, prove to be not only a better jurist, but as good an English lawyer. This is the rather so, as that part of English law which the Roman law

least helps to elucidate is now of much slighter importance than formerly—I mean the feudal law of land. A change has passed upon us, somewhat similar to that which Cicero saw passing at Rome. In his youth, he tells us, he like other pupils of the great *prudentes* was required to learn by heart the contents of the Twelve Tables, whereas in his later days it was the Praetor's edict that formed the basis of legal training. So Coke upon Littleton, which thirty years ago was held forth as a sort of Bible to the unfledged lawyer, is now seldom in his hands; his time is given rather to commercial law and to the doctrine of trusts and powers, and the principles governing incorporated companies and the relations of directors to intending investors and to shareholders—subjects to which the leading principles of the Roman law are more capable of being profitably applied.

It is not, however, merely as an introduction to his professional studies that the English lawyer will find the study of Roman law profitable: if rightly used it will be a guide and a help throughout his whole career. More than anything else, it will deliver him from the tendency to deal with law in a desultory method and an empirical spirit, by displaying to him fixed and general principles underlying the multitude of details. It will do for him what the knowledge of some foreign language does for the grammarian and the logician, in the way of freeing him from that bondage of words to which most men are all their lives subject. Setting him to compare the terms and conceptions of another law with those of his own, it will enable him to criticize the latter from an independent point of view, and so deliver him from the danger, common in all professions and to all systems, of mistaking the accidental for the essential, of exalting mere technical rules and phrases into necessary and permanent distinctions. Further, it may do much to supply, from its choice and abundant stores, the defects in English legal terminology. We are especially ill provided with terms fitted to convey the main conceptions of universal jurisprudence;

and we find the want a serious impediment, not only to legal exposition and the conduct of legal argument, but also, as has been remarked by a distinguished jurist, now one of the ornaments of this University[1], in the work of practical legislation. The terminology of the Romans was exact as well as copious; and it has been greatly amplified and improved by the labours of modern civilians. As it is, we often draw upon the Roman vocabulary, but what we borrow we are apt to use loosely, and in a sense different from that of the old Romans or of their modern commentators; whence further confusion.

There are two capacities or mental habits in which the distinctive excellence of a legal intellect chiefly consists—the power of applying general principles to concrete cases, and the power of enunciating a legal proposition with clearness and precision. Towards the formation of both of these the writings of the Roman jurists supply more aid than do those of their modern English rivals. The conspicuous merit of the Roman lawyer was his command of principles, and the skill with which he manipulated the rules of an originally very technical system, so as, without any loss of consistency or 'elegance,' to avoid the inconveniences which an adherence to technical strictness must often produce. As Savigny puts it, 'In our science, all results depend on the possession of leading principles, and it is precisely upon this possession that the greatness of the Roman jurists is based. The conceptions and maxims of their science appear to them not as if created by their own will; they are actual beings, with whose existence and genealogy they have become acquainted from long and familiar intercourse. Hence their whole course of proceeding has a certainty which is found nowhere else out of mathematics, and it is no exaggeration to say that they calculate with their ideas. This method is nowise the exclusive property of one or a few great authors: rather is it the common inheritance of

[1] Sir H. S. Maine.

all; and although the power of applying it is divided among them in very unequal measure, still the method itself is in all of them the same. . . . If they have a case to decide upon, they set out from the most vivid perception of it, and we see before our eyes the origin and development of the whole affair in all its phases. It is as if this particular case was the starting-point whence the whole science was to be explored. Hence with them theory and practice are really not distinct; their theory is so thoroughly worked out as to be fit for immediate application, and their practice is uniformly ennobled by scientific treatment. In every principle they see an instance of its application; in every case, the rule whereby it is determined: and in the facility with which they pass from the universal to the particular, and the particular to the universal, their mastery is incontestable [1].'

Now every legal opinion, argument, and judgment chiefly turns on the application of known principles or rules of law to facts; and this either by way of fitting the law to the facts—that is, of expounding the nature, meaning, and limits of a principle in such wise as to make it appear to cover the facts proved; or conversely by way of fitting the facts to the law, that is to say, of setting forth the rule or principle, as admitted, and then of so stating the substantial result of the facts taken as a whole, as to make it appear that the case falls under this rule as already given. In this process the Roman jurists shone preeminent. English judges, certainly from no want of learning or acumen, but rather from a sort of caution, or from a traditional reluctance to deliver an opinion going any further than may be necessary, have generally been unwilling to formulate principles, preferring, where they could, to dilate on the special circumstances of the case, and base their decision thereon; and the consequence is to be seen in the prolixity of our Reports, and the uncertainty of much of the law contained in them. The labour of reading English cases is great in proportion to the quantity of positive law

[1] *Vom Beruf unserer Zeit für die Gesetzgebung und Rechtswissenschaft*, c. 4.

they embody; and their philosophical worth not commensurate with the genius and industry bestowed upon them by both bar and bench. The cases, if one may so call them, which we find in the Roman jurists give more law and more real intellectual training in a much smaller compass. They are often imaginary, invented to show the application of a rule, and are therefore short and clear, enforcing their principle with a directness which makes it easily apprehended and remembered. In reading them we seem to learn better than anywhere else how principles should be dealt with.

In the matter of legal expression the superiority of the Romans is scarcely less marked. The power of stating a proposition of law in comprehensive and exact terms, wide enough to cover all cases contemplated and yet precise enough to exclude cases more or less similar to which the rule is not intended to apply, is valuable to the text-writer and quite indispensable to the framer of statutes. Unfortunately it is one of which our statute-book bears few traces. Now the legal language of the Romans is a model of terseness, perspicuity, and precision, and from a study of it, even allowing for the difference between the structure of the two languages, the English draftsman may derive many valuable suggestions.

Over and above the specific benefits enumerated, it must be added that a study of the Roman law would not merely tend to produce, but must necessarily precede, any extended healthy intercourse between our jurists and those of the rest of Europe, any participation by us in the general advancement of juridical science. 'England,' said an eminent continental jurist, surveying the progress made in his department, 'England sleeps for ever': and she sleeps because her lawyers have allowed themselves to become as completely isolated as though we were living in and legislating for a planet of our own. Certainly, when one remembers how in other branches of inquiry each country depends upon its neighbours, how

meagre would be our scholarship, our ethics, our history, our criticism—never to speak of medicine and the whole circle of the sciences of nature—if in each of these subjects we trusted to our own efforts only—it does seem strange that in the matter of law we should be content to draw nothing from the labours of other nations. As the facts law deals with are in the main the same in all civilized countries, and the substance of its leading conceptions virtually identical, there must clearly be much for us to learn from other highly cultivated systems, and it is only our ignorance of the common legal vocabulary of Europe that keeps us from so learning. The habit, however, has grown so strong that we do not even care to profit by the experience of a country which speaks our own legal language—the United States—where many problems have been handled by the Courts and many experiments have been tried by the legislatures which are full of instruction for us [1].

This argument, being directed to show that the study of the Civil Law will help to make English law more of a system and a science than it is now, and to train the individual lawyer in more philosophical habits of mind, proceeds upon the assumption that law ought to be a science and lawyers philosophical. To prove the truth of this assumption would involve a discussion of the relations of theory and practice generally; and in a University, at least, no such proof will be demanded. Science, like wisdom, is justified of all her children; and those who, in the teeth of what we have seen during the last eight months [2], persist in holding theory to be a hindrance to practice, would, quite consistently, refuse to be convinced by any such general considerations as those which determine academical opinion. Without entering, however, on this higher ground, I may be permitted to mention two practical

[1] Cases decided in the United States are more frequently cited in English Courts now (1901) than they were in 1871.

[2] The reference was to the war, just ending when this lecture was delivered, between Germany and France.

reasons for desiring to see our law treated as an organic and harmonized system of rules. One of these is the direct gain which the whole community would derive from a simplification of its form. Owing to the way in which English statutes are drawn, nearly every amendment of the law makes it more complicated and obscure than it was before. A new Act seldom repeals a preceding Act or Acts on the same subject as a whole: it abolishes some of their provisions, incorporates others, and modifies the rest. In dealing with a rule of the common law, instead of expunging the rule altogether, or laying down a new principle by which it is to be controlled, it usually establishes a series of exceptions in a manner so seemingly arbitrary as to make it very difficult to determine, when a new case arises, whether or no it was within the contemplation of the Act. The Married Women's Property Act of last session is an instance in point [1]. Similarly, vast branches of our law, such as that which relates to public health and to the regulation of mines and manufactures, are suffered to remain in a state of hopeless confusion—Acts fringed with decisions piled upon other Acts and their decisions, till it becomes impossible, without a long and painful research, to say what is law and what is not [2]. This wretched state of things, which makes a resort to the Courts far more costly, and its issue far more uncertain than it need be, though partly due to existing parliamentary arrangements, is also in great measure due to the want of that feeling for the symmetry and simplicity of the law which a scientific conception of it would be certain to produce in the profession. The public, which feels the evil, is powerless to remedy it; while those

[1] This Act caused so much trouble that it had to be amended and the law recast by the Married Women's Property Act of 1876.

[2] A marked improvement has, however, taken place since the establishment of the office of the Parliamentary Counsel a few years ago. Many Bills, however, including all those brought in by private members, do not pass through this office, and even those which come from it suffer in point of form in their passage through Parliament. Since 1871, much has been done in the way of consolidating the Statute law. See Essay XIV, *ante*.

members of the profession who have the power are deterred from the necessary efforts, not, as is commonly supposed, by the mean notion that it is their interest to keep their art a mystery, but partly by long habit, which has made them indifferent to the beauty of order, partly by the want of that scientific training on which the success of amending legislation depends.

The second benefit is the reflex effect upon the legal profession of a higher conception of the studies to which it devotes its labours. The complaint is often heard that men of literary culture and polished taste rise more seldom than formerly to the highest places at the bar and on the bench; that it is now private connexions rather than the finer gifts of intellect and character which open the path to professional success. If this be so, it is surely in great measure because our system of legal education gives too little scope to these nobler qualities, and turns them to no account in directing the studies of the aspirant. The life of a lawyer, tedious and distasteful in some of its details, would be more enjoyable if his occupation called out, as it ought to do, the highest faculties of his mind; and the tone of the profession, which will sooner or later be threatened here by the temptations which have begun to threaten it elsewhere[1], will be best maintained in purity by a sense of the dignity of the subject it deals with as a department of philosophical inquiry. It is scarcely possible that a corrupt administration of justice can coexist with an enthusiasm for the abstract propriety and elegance of law as a science, such as existed among the great jurists of Rome.

I am sensible that in this enumeration of the advantages of the study we have been considering, I may probably be falling into the common error of those who having a theme allotted them, try to bring more out of it than

[1] The reference was to the scandals which had recently arisen in some of the State Courts in the United States. These have now (1901) been almost entirely removed.

there is in it. To correct such a mistake, let it be frankly admitted that Roman law, though indispensable to the philosophical jurist, is not so to the practitioner; and that no knowledge of it can make up to him for the neglect of his own law. Let it also be conceded that it is not a subject ever likely to hold a front rank among those which awaken the ardour of our academic youth. It wants that charm of incompleteness, of unexhausted possibilities of discovery, which fascinates us in the sciences of nature. It does not, like metaphysics, set us face to face with the most stimulating problems of thought and life; nor can it, like history, dazzle the imagination and stir the emotions, by leading us through a long gallery of striking scenes and characters. Yet the study is one which pleases and satisfies as well as instructs; for it is at once, and that in the healthiest way, theoretical and practical, excellently philosophical in its methods, yet never quitting the firm ground of reality. Its materials are contained in the writings of men, the purity and loftiness of whose ethical tone were scarcely surpassed by the brilliance of their constructive genius. It is perhaps the most perfect example which the range of human effort presents of the application of a body of abstract principles to the complex facts of life and society. To quote once more from the most famous of modern jurists:—'The study of Law,' says Savigny, 'is of its very nature exposed to a double danger: that of soaring through theory unto the empty abstractions of a fancied law of nature, and that of sinking through practice into a soulless unsatisfying handicraft. Roman law, if we use it aright, provides a certain remedy against both dangers. It holds us fast upon the ground of a living reality; it binds our juristic thought on the one side to a magnificent past, on the other, to the legal life of existing foreign nations, with whom we are thereby brought into a connexion wholesome both for them and for ourselves[1].'

[1] Preface to vol. iii. of the *System des heutigen römischen Rechts*.

Standing midway between those classical and historical studies which belong to a general liberal education, and those purely professional studies which form the first stage of active life, it is especially fitted to lead men from the one to the other, and show them how to turn to account in the latter the ideas and capacities which the former has given them. But although this is a strong reason why the University of Oxford should undertake to recognize and promote the study, it is not the only or the chief reason. Even more important than the function of an University in education, is the scarcely separable function of dealing with every department of human activity in the abstract, investigating its principles and developing its rules in their philosophical coherence. We are all too apt, in the hurry of life and the pressure of its trivial necessities, to lose sight of that which is universal and permanent—to forget that what we are pursuing as a trade is the subject of a science, and has, as such, its greatness and its perfectibility. The ideal is not far from us, but we catch only transient glimpses of it; and of those who continue in maturer life to cherish the belief in its worth, the most conceive of it in relation to their inner life only, and look on their action in the world without as something which belongs to another and a meaner sphere. The University is appointed to correct this failing—to link the present, in which things seem petty, to the past which clothes them with a mellower light—to ennoble practice by a constant recurrence to theory—to show that intellectually as well as ethically there is nothing common or vulgar, nothing which may not and ought not to be considered as within the domain of Philosophy, who, the more perfect she becomes, sees more clearly that which is great in that which is the least. In undertaking, therefore, not only to educate in the ordinary liberal studies, but also to deal in a broad and lofty spirit with such large practical topics as this of law, the English Universities will in a new way justify their possession of that wealth and external splendour which they

alone out of the great mediaeval sisterhood have been privileged to retain. They will associate themselves more closely with the life of the nation, and confirm the reverence with which it still regards them; nor is it idle to add that in thus enlarging the scope of their activity, they will be closely following and worthily maintaining the traditions of their glorious past.

XVIII

VALEDICTORY LECTURE[1]

LEGAL STUDIES IN THE UNIVERSITY OF OXFORD

Twenty-three years have passed since I entered on the duties of the Chair of Civil Law in this University: and to-day, in obedience to precedents of high authority, I come to say some parting words suggested by the experience of those years. They have been years full of experience for us all: and it may be not unprofitable that I should note the changes they have brought and endeavour to estimate the position which legal studies, and especially the study of the Civil Law, have now reached in the University and in the country.

Those changes have been many and momentous. Since 1870 the University has nearly doubled the number of its undergraduates and has greatly increased the number of its teachers. It draws students much more largely from the less wealthy classes of the people. A new college has been founded, and risen to prosperity: an old one has been refounded and enlarged. Two colleges for women have sprung up and taken firm root. Theological tests have been abolished: persons not belonging to the Church of England as by law established have begun to resort freely to Oxford:

[1] Delivered on resigning the Regius Professorship of Civil Law at Oxford, June 10, 1893.

two theological faculties belonging to unestablished religious bodies have come to dwell in her midst, and have received a courteous welcome. Nor have any of the unfortunate consequences predicted as likely to follow from the admission of Nonconformists been actually experienced, for there has been a diminution of theological controversy, a growing sense of friendliness and sympathy among Christians, a more assured peace in the minds of our students.

The examination system has been remodelled, with a regrettable but perhaps inevitable increase of complexity, as well as enlarged by the inclusion of new studies. The University and the Colleges have been dealt with by Parliament and by an Executive Commission: and the serious consequent evils have been not wholly uncompensated by gains. Oxford has undertaken many new kinds of work. She provides University Examinations for Women, and sends zealous young lecturers everywhere through England to bring teaching of an academic type within the reach of the people.

As regards Law, while the degree of Doctor of Civil Law has become a true distinction by the requirement of a thesis of substantial merit instead of the former purely formal exercise, the B.C.L. examination (theretofore scarcely serious) was made by a statute of 1872 a reality: the standard both of honours and of the pass degree has steadily risen, and this rise has been accompanied by an increase of candidates. That examination is probably now, I do not say the most severe test of legal attainments, but the best arranged and most practically useful law examination in England. In the years preceding 1870 there were seldom more than two or three entrants for this examination, almost absurdly easy as it then was. There are now usually upwards of twenty and sometimes twenty-five. Similarly the number of candidates in the School of Jurisprudence, by which candidates can obtain the degree of B.A., has grown and the quality of the work has improved.

In 1868 there were only three Chairs in the Faculty of Law: those of Civil Law, Common Law, and International Law, besides the temporary Vinerian Readership; and of these that of Common Law was virtually in abeyance. In 1870 the work of the Corpus Professorship of Jurisprudence began with the lectures of an illustrious writer whose fame two Universities dispute, for if Cambridge reared him, Oxford gave him the occasion for teaching, Sir Henry Maine. In 1878 the Readership in Indian Law, and in 1881 that in Roman Law, was founded and the opportunity taken of placing in it the zeal and learning of a German civilian—Dr. Erwin Grueber—whose lectures have proved most helpful. In 1882 the Vinerian Chair of Common Law became (as we trust it will ever continue) a working chair by the choice of another distinguished man whose powers, always admired by his friends, are now recognized over the English-speaking world, and to whom belongs the rare honour of having devoted those powers to the service of his political allies in a great and burning controversy without impairing the respect which all parties feel for the depth and soundness of his constitutional lore.

Thus there are now seven working professorships: and to these we must add, in estimating the teaching force which the University possesses, the lectures of another distinguished writer who may be reckoned as virtually a law professor—the Warden of All Souls: and of more than ten College lecturers, who serve the University as well as their respective Colleges, with recognized efficiency.

Thus, upon a review of recent years, we may say that as the whole University has grown and expanded, so has also this side of her activity, and that which was once a dry river-bed, or presented, like a South African river, only a few scattered pools of stagnant water, has now become a wide and fertilizing stream.

That serious deficiencies exist I am well aware: I shall presently advert to them and to the steps that may be taken

to remove them. For the moment, however, I am noting progress actually made and gains actually secured. Among these may be reckoned the assured position which the study of the Roman Law now enjoys.

Though this was the first subject recorded to have been taught in Oxford, for one of the earliest notices of the University is to be found in the sentence 'Magister Vacarius in Oxenefordia legem (*sc.* Romanam) docuit,' and though from his time (the reign of King Stephen) down till the seventeenth century it held a rank second only to that of theology, it had within the last hundred years virtually died out of the University, and this chair, founded by King Henry VIII in 1546, and occupied in the time of King James I by Alberico Gentili, had become a sinecure. A few law degrees no doubt continued to be given, but they carried no evidence of knowledge. The revival begins with the substitution in 1852 of an examination (albeit a very slight one) for the old formal exercises for the degree of B.C.L., and the creation in 1853 of the Law and Modern History School (in which the Institutes of Justinian were made a subject of examination). That School was in 1872 divided into the present two Schools of Modern History and of Law, in the latter of which Roman Law received a more important place. Till 1870, however, there was scarcely any teaching, and what little did exist in the colleges was confined to commenting upon the solitary book required for the examination. No one had lectured on the Digest; no one had treated the history of the subject. This was part of that remarkable isolation of England from the general current of European legal thought and practice which was due partly to the resistance to the encroachments of the Canon Law, first of the barons in the thirteenth century, and again of the Parliament under Richard II, partly to the great religious breach of the sixteenth century, an isolation once politically fortunate, for it helped to develop the free spirit of the common law, but in our days, when the old dangers have vanished, a circumstance to be

regretted and removed. Among the modes of removing it, the study of the Civil Law is not the least important. That study may now be deemed to have struck here in Oxford deep and tenacious roots. Both in our examinations and in our teaching it holds a place equal in dignity to English Law, though doubtless of narrower compass. It attracts in fully as large a measure the interest of the more intelligent among our students, and it can hardly be doubted that the excellence of the Law School in the future will largely depend upon its maintenance as a main element in both teaching and examination.

Its practical utility to the English lawyer is one of the points on which you may expect the results of my experience to be stated; for it is a point upon which attention must be constantly fixed, and I have had opportunities of studying it amid the din and dust of forensic practice in London no less than in the cloistered seclusion of Oxford.

In the Inaugural Lecture which I delivered here in 1871, an attempt was made to treat this subject. It was there pointed out that the utilities of the Civil Law to Englishmen might be reduced to three heads. One was its connexion with the main stream of the world's history from the time of Pyrrhus, the first formidable antagonist from non-Italian soil whom Rome overthrew, to that of Muhamad, by whose first successors the East was torn from her grasp; and its influence, less conspicuous, but still considerable, upon the growth of opinion and the development of institutions ever since. This is an aspect of the subject which, since it belongs rather to the historian than the lawyer, I shall not pursue further to-day, though subsequent reflection leads me to believe that its importance can hardly be overrated. The second utility was to be found in the fact that Roman Law is the substratum of some branches of English Law, directly of the law administered in the Probate and Admiralty Division of the High Court of Justice, and indirectly of a good deal administered in the Chancery Division, in the further fact

that it is the actual law of some of our colonies from which appeals come to the Privy Council, as well as the foundation of the law of Scotland whence appeals come to the House of Lords, and in the command which it gives of the law of modern continental Europe, since it is the basis of the systems that prevail in all those countries, and its knowledge is a sort of master-key to each and every of them. These circumstances—so I then argued—make it practically serviceable to the practitioner, and justify a man bent on professional success in devoting some time to its study. The third utility was to be found in its educational value, as forming the mind and training the aptitudes of the student devoting himself either to the theory or the practice of English Law. On these latter two of the above-mentioned three points it is proper to say a few words.

An observation extending over twenty-two years leads me to lay less weight than I laid in 1871 on the direct professional gain, in the way of securing practice at the bar, to be expected from a knowledge of Roman Law. Sometimes no doubt a man may find such knowledge directly helpful in writing opinions (especially if points of Scotch or French or German or Roman Dutch law arise), or in arguing before a Court. Once in addressing the House of Lords in a Scotch Appeal I discovered a pretext for quoting the Digest, which that august body received with grave approval, as not unbefitting the large survey they are wont to take of every matter that comes before them. But instances of this kind are rare in ordinary practice. It would be unbecoming to dilate upon this aspect of the question, for a University is the last place in which the worth of knowledge ought to be measured by its merely gainful utility, or where our studious youth ought to be led to set their hearts upon immediate practical success. Still, if one is asked to deal with the point upon a hard utilitarian basis, I cannot allege that the advantage to be expected from the possession of this acquirement does much more than counterbalance the

impression which still prevails in the 'other branch of the profession,' that it is a little uncanny for a barrister to be known for anything except his knowledge of the English Law. Things might fall out differently for the young civilian to whom a judicious firm of solicitors vouchsafed a chance of getting into Canadian Appeal business or Admiralty business. But in such a world as the present, and more particularly at the bar, one cannot await chances or shape one's course with a view to them; one must seize those that come and float onwards with the tide. The ambitious junior may desire to be employed in subtle questions of insurance or company law, but if briefs are offered him at the Old Bailey or even in the Divorce Court, he will probably deem it wise to accept them, and to wait till his position is assured before he begins to pick and choose among the business which clients send. In the long run, no doubt, a man who knows Roman Law will find many cases in which, when he has attained a front rank in the profession, he can profit by that knowledge. But the main thing for the practitioner is to get a start; and it is not certain that any one will get this start sooner by being as good a civilian as Oxford can make him.

This may be deemed a somewhat sordid aspect of the matter; so let me hasten to correct any possible misapprehension by adding that as respects the third head of utility —that of the benefit to a student's mind which training in Roman Law gives, I can dwell upon it with a confidence deepened by the experience of every year. Far be it from me to disparage the law of England as it was disparaged by the eager reformers of seventy or even of fifty years ago, impatient of the defects, many of them removed since their days, which then marred its noble proportions. It is a system worthy of all admiration for its humane spirit, for the sense of civic equality and personal freedom which pervades it, for its elastic power of adapting its provisions to the needs of the great communities that live by it, not here only but beyond the Atlantic and beneath the Southern Cross. Its faults lie

not in its substance but in the form which the historical conditions of its growth have given to it. It is a system extremely hard to expound and hard to master. So vast is it and so complicated, so much are its leading principles obscured by the way in which they have been stated, scattered here and there through cases reported in a chronological order, which is the perfection of disorder, so much have many of its main doctrines been cut across and (so to speak) dislocated by modern Statutes, that it presents itself to the learner as a most arduous study, a study indeed which only a few carry so far as to make themselves masters of the whole body of our working rules. Roman Law, on the other hand, is not only simpler, since it wants those differences between real and personal property, and between legal and equitable rights to which so much of our English complexity is due, but more limited in its range, large modern departments, like those of company law and insurance law and negotiable instruments, being absent. It is therefore a subject the whole of which the student can more easily bring under his eye, seeing the various parts in their relation to one another. What is of still higher import, the Roman Law is symmetrical and coherent. Each part not only has, but displays, its organic relation with every other part. The original sources in which we possess it are of moderate bulk, not larger than the English Law Reports of the last four or five years, and not a two-hundredth part of the total volume of our Reports.

Less than one-fourth of these writings is now of practical consequence, for the remainder, though interesting historically, deal with matters not significant to the modern lawyer. But the fraction which still concerns us is of the highest possible merit. In it one may find something of value upon almost every principle and general legal doctrine with which a jurist has to deal. The legal conceptions set forth are those upon which all subsequent law has been based; and nearly all of them find their place in our own system, which they have largely contributed to mould. Two of the Roman text-books

deserve special mention. The Institutes of Gaius is a model of vigorous precision and lucidity, an elementary treatise to which we have nothing comparable. The Digest of the Emperor Justinian, containing short extracts from a number of the most eminent legal writers of earlier times, has excited the admiration of all succeeding generations by the concise, delicate, and philosophical way in which principles are set forth and points of detail investigated. Its contents are philosophical, not in the sense of being abstract, but in the firm grasp of principles, and the refined exactitude with which every principle is applied. No rules could better conform to the three canons of good law, that it should be definite, self-consistent, and delicately adapted to the practical needs of society. No study can be better fitted to put a fine edge upon the mind, or to form in it the habit of clear logical thinking.

In England we have nothing similar, and although the study of case law may be made, and has sometimes been made in the hands of a skilful teacher (such as Mr. C. C. Langdell, of the Harvard University Law School), as good a training in subtlety and exactness as the Roman Law or indeed as the scholastic logic of the Middle Ages, the immense bulk of our cases makes it difficult to pursue such a method over the whole field which a learner ought to cover.

'Nevertheless,' some one may say, 'even if the merits claimed for the Roman system be admitted, it is not our English system, and you are doubling the learner's labour. Why should he add to the time and toil that the study of English Law needs, the time and toil, less though it be, needed for mastering the Roman? Why attempt both, when one alone is, on your own showing, so arduous?'

The answer is that the learner will make quite as rapid progress with English Law if he has begun with Roman as if he proceeds to break his teeth from the first upon the hard nuts of our own system. Twenty-one years ago I ventured to say this here and I venture now to repeat

it with fuller confidence. Two men of equal ability and diligence start together after taking their B.A. degree. One gives a year to Roman Law and the two next to English. The other devotes to English the whole three years. At the end of the three years the first will know as much English Law as the second. He may not have covered so much ground or got on his tongue the names of so many cases, but he will know what he does know—nor will it be much less in quantity—more thoroughly and rationally. The explanation is twofold. In learning Roman Law, one learns the elements of law in general, and therefore of English Law also, these elements being more easily learnt from Roman sources, than they could be in the form they have taken among ourselves. And, secondly, in learning Roman Law one obtains a means of testing one's comprehension of the real meaning of English terms and the nature and compass of English rules, which deepens and strengthens the learner's hold upon his knowledge. The main difficulty which besets students till they have had a good deal of actual practice is to turn into the concrete the rules they have learnt in the abstract, or as a Roman lawyer says, *Leges scire non est verba earum tenere sed vim atque potestatem.* The study of reported cases is a valuable aid in grasping the practical application of rules, but cases are complicated by many details extraneous to the principle. When, however, a man has so mastered the main outlines of Roman Law as to be familiar with its conceptions and understand the application of its leading rules, he is naturally and almost necessarily led in his study of English Law to compare the conceptions and rules he finds there. His text-book tells him, for instance, that the English rule regarding the passing of the ownership of an object sold, is such and such. What is the Roman rule? If the two rules agree, he remembers the English better. If they vary, he is led to ask why; and he obtains a juster view of the origin, bearings, and range of the English rule from perceiving wherein it differs from the Roman. If

any one thinks there is a risk of his confounding the two, and becoming muddled between them, I can only say that I have never known this happen, partly, perhaps, because in dealing with Roman Law one thinks in Latin—a good thing to do—and expresses in its technical terms the result one arrives at. On the contrary, the student gets a clearer and sharper view of the grounds of every doctrine, and of its precise compass, than he could get from studying either system by itself. It is as when in studying a foreign language one translates constantly backwards and forwards into one's own, and obtains thereby both a finer perception of the idioms of both, and a more exact comprehension of the substantial meaning of every sentence that is so translated.

I may be reminded that the advantage here claimed does not apply to all departments of Roman Law alike, but to those only which cover the same field as our own Law. The remark is true, and draws with it a practical lesson. The subject has two aspects. Besides its intrinsic scientific interest as a vast and harmonious system, it has a historical aspect for the scholar and the student of institutions: it has a practical or professional aspect for the lawyer. Different parts of it are especially interesting to one or other of these classes. Much of the law of persons, of crimes, and of procedure, while it engages the curiosity of the scholar or historian, is too remote from modern conditions of life to attract, or to profit, the jurist of to-day. What he will chiefly value are the parts that deal with the law of Property, including Inheritance (though even in this there is a good deal whose interest is now merely historical) and of Obligations, together with some parts of the law of persons, such as marriage and guardianship. These are the parts on which the teacher should here in England expend his efforts, for it is in these that the comparison with English Law is chiefly instructive. He should lead the student along a path from which the parallel territories of English Law are in full view, and carry him constantly to and fro across the border. So if

I may, at the risk of seeming to transgress a Roman rule, give a legacy to an uncertain person, I will bequeath to my successor, whoever he may be, this maxim as the best practical result of my experience—that Roman Law must always be so taught as to be brought into the closest and most constant relation with English Law, since it will thereby become not only more helpful but more enjoyable to both learner and teacher. It ought to be treated as a practical working system, full of life, not only because it is preserved to us in lifelike detail, but also because it is still actually in force as the operative law of some countries, full therefore of direct instruction and suggestion for ourselves, capable of being used to enlarge English conceptions or indicate useful modifications of English rules.

In discoursing on it, if I may in this expiring swan song refer to my own experience, I have usually passed by what may be called its antiquarian aspects, not from any want of interest in them, but because the object of quickening the interest and training the intellect of the *cupida legum iuventus* seemed more urgent. It has been rather in the public lectures delivered from time to time before the University, that I have endeavoured to develop and illustrate the wider historical relations of the law of Rome, and to connect it, sometimes in the letter, sometimes in the spirit, not only with the history of the Empire and the Church, but also with the problems of abstract jurisprudence, with political ideas and constitutional forms, with the legal institutions of peoples remote in time, like the primitive Icelanders, or dissimilar in race and habits, like the Musulmans of the contemporary East, with current questions on which Roman experience sheds light, such as the law of Marriage and Divorce, with the enterprises of modern law-makers, like the Legislatures of the States of North America or the rulers of British India. Sometimes these lectures may seem to have strayed beyond the strict limits of the Chair. I have then fallen back on the ancient adage *Roma caput mundi*

regit orbis frena rotundi, and have feigned for the Imperial law a continuance of its oecumenical authority. The Roman law is indeed still worldwide, for it represents the whilom unity of civilized mankind. There is not a problem of jurisprudence which it does not touch: there is scarcely a corner of political science on which its light has not fallen.

In the opportunities for such placing the two systems side by side lies the one great advantage which English and Anglo-American civilians enjoy as compared with their continental brethren. To the latter the Roman Law is the basis—in some countries it may almost be called the modified substance—of the current law. To us it is a parallel system with which comparisons can be made. These comparisons are eminently fertile in elucidation of the past condition of both systems, and in criticism of their present condition. To no scholars ought the early history of the Roman Law to be at once so easily comprehensible and so instructive as to us in England, because the history of our own law is full of beautiful analogies therewith. So no jurists are better able to estimate the value of Roman doctrines on many principles of contractual law, because our system has developed independently, and illustrates the Roman equally where it differs and where it agrees. We in England cannot pretend to rival the work which the great Germans of this century, men like Savigny and Vangerow, Ihering and Windscheid and Mommsen, have done for the investigation and exposition of Roman jurisprudence and legal history. But our detached position ought to give us a perspective and a freshness of critical insight, perhaps even a means of comprehending things by reading our own experience into them, which continental scholars sometimes lack; and of that experience, we may trust, due use will some day be made. For I cannot doubt, looking not only to the progress of the study in England, but to its rapid and solid growth in the Universities of America, that the study of the Roman Law, once so nearly extinct

among us, is now destined to shine with a steady light for generations to come.

I had intended to review, in connexion with the progress of our own law school, the changes which have passed on the aspects of legal science in England within the last thirty years. Two among them give cause for regret, the decline of interest in projects for simplifying and consolidating the law, and the growing despondency wherewith attempts to amend our legal procedure are now regarded, a despondency probably due to the imperfect success which has attended those Judicature Acts from which so much was hoped twenty years ago. There are few countries in which so small a proportion of the men engaged in professional work show an active interest in legal reforms. Against these grounds of disheartenment I should have set the increasing zest wherewith the comparative method is being historically applied to the investigation of the origin of law and of political institutions, and should have dwelt on the revived study of primitive custom as the foundation of those institutions, as well as on the more active discussion of constitutional questions generally, whether foreign, or American, or domestic, and the vigour which so many of our younger writers show in examining the ethical and economic bases and grounds of law, with views wider and more sympathetic, if also more suffused by the moist light of emotion, than were those which some among us drew from the Utilitarians of the last generation. But these topics would lead me too far afield; it is for the present enough to observe two happy changes which we have ourselves seen—one, the warmer interest which the two ancient Universities display in the problems that engage the attention of social reformers and the willingness they show to aid practically in their solution; the other the much larger share which the jurists and constitutional students, as well as the economists, of America and the British colonies have come to take in all these discussions. As our books are

known and conned beyond the ocean, so here we read and prize the most eminent colonial writers; and we find in an American magazine, the *Political Science Quarterly*, an excellently conducted organ, such as Britain has not yet been able to provide, for the discussion in a scientific spirit of a whole class of constitutional and quasi-political questions. As the isolation of England from Continental Europe is less marked than it was half a century ago, so still more conspicuously does the intellectual and moral unity of the English race dispersed throughout the world stand forth to-day in a clearer and fuller light.

Let us turn back to consider what still remains to be done to give this law school, now firmly established in the University, its due hold upon the legal profession and its due opportunities of promoting the progress of legal science. None of us can be blind to its present deficiencies. We have accomplished less than we hoped in raising up a band of young lawyers who would maintain, even in the midst of London practice, an interest in legal history and juristic speculation. The number of persons in England who care for either subject is undeniably small, probably smaller, in proportion to the size and influence of the profession, than in any other civilized country; and it increases so slowly as to seem to discredit the efforts of the Universities. Of those who have undergone our law examinations comparatively few have either enriched these subjects by their writings, or have become teachers among us, or have taken any part in promoting legal studies elsewhere[1].

How is this deficiency, which ought to be candidly confessed, to be explained? No one will lay it at the door of the University and College teachers, whose eminent services have been already referred to. To me it seems chiefly due to the following causes, causes which I mention because they may all be removed. One of them is the

[1] A very few names occur to me of persons who have so written or taught, but I abstain from mentioning these lest I should omit others.

short-sighted and perhaps somewhat perverse unwillingness of the authorities who control admission to practice in both branches of the profession in London, to give full recognition to our Oxford Law Examinations and Degree. Were the tests we apply so recognized as to relieve one who had passed them from all examinations for admission either to the bar or to practice as a solicitor, except such examinations as turn upon those purely practical matters which can only be learnt in a barrister's chambers or a solicitor's office, a strong motive would be supplied to men destined for the profession to pursue their legal studies and take their legal examinations here, where we may without vanity say that both teaching and examining are understood much better than by the professional authorities in London. Needless to add that the University would be perfectly ready to allow those authorities every means of satisfying themselves of the character of her examinations, as the General Medical Council is accustomed to supervise the medical examinations of the various medical bodies.

A second cause lies with Oxford herself in her own examinations. Not only do they cramp the teacher, practically debarring him from some topics; but they are so arranged as to prevent the Law School from receiving, with some few exceptions, men of the first intellectual rank. The ablest and best prepared of the students naturally, and rightly, enter the classical school, and find themselves obliged, when they have obtained their degree in it at the age of twenty-three, to quit the University for the work of life. Do not suppose that I for a moment desire to draw such men away from the classical school. No one who has himself passed through the training of that school will doubt its superior value to even the best-arranged Law School, as a part of the education needed to make a good scholar, a good citizen, and a good Christian. What we want is such a revision of our arrangements as will bring men to the University somewhat younger, and will enable those who

have obtained honours in the school of Literae Humaniores, and intend to follow the legal profession, to pass into the Law School when they have taken their B.A. classical honours, and devote at least a year (though in the Law Schools of America two years at least are thought needful) to professional studies. At present Oxford is in the absurd position of practically excluding from the legal instruction which the University provides the most promising of her students, the very men who are best fitted to turn it to account in their subsequent career. They spend at school a year which they ought to spend at college, and they spin out their general studies so long that they are unable to obtain that scientific training in the future work of their life which the University has been at such pains to set before them. To find time and make provision in our curriculum for professional as well as general literary studies was one of the chief problems which the Commissioners of 1878–81 ought to have dealt with. Their failure throws back upon the University herself the duty of reform. Other, though less material, causes may be found in the undue prominence which examinations have been suffered to take in the system, and in the very unsatisfactory relations between the teaching provided by the University and that which the Colleges supply, relations which involve much overlapping and a serious waste of teaching power.

I need not pursue this topic into its details. Let it suffice to remark that it is not merely for the sake of the University that one would desire to see her influence upon legal studies extended. Over and above that general liberal education which it is her main business to give, and on which neither law nor any other special study must be suffered to infringe, it is her duty to handle professional studies in a wide and philosophic spirit, to raise them above mere gainful arts into the domain of science, to draw to herself the ablest of those who are entering these professions, the men from whom each profession receives its tone and temper. You all know how

much the practical sciences, such as medicine, chemistry, and engineering, have gained by being closely associated with the pursuit of abstract science. No less true is it that men who follow these occupations, and those who devote themselves to the bar or to the church, profit by their association with literary and scientific culture and its central home here, feeling themselves members of a great learned corporation, and carrying away with them the influence of the ideals it has taught them to cherish. It is upon the clergy that this influence has hitherto told most; nor has anything done more to keep the clergy of the Church of England from becoming a caste and to stimulate their activity in those fields of philosophic and historical research wherein they have won so much distinction. One would like to see the University lay the same hold on the other great professions likewise.

This, however, is only one of the points in which observers who have watched and studied Oxford from without as well as from within are disposed to think that she does not fully comprehend, does not at any rate fully use, her unrivalled opportunities. I touch upon a delicate point. Yet as Homer occasionally invests a dying warrior with prophetic gifts, one who is on the eve of departure may be permitted to give expression to some of the aspirations that have long filled his mind when he has thought of what Oxford might achieve. She seems at present to be too exclusively occupied not only with the giving of a general liberal education (to the disparagement of professional studies), but also with her regular curriculum and those who follow it, to the neglect of those others, now comparatively few, but capable of almost indefinite increase, who desire not so much to follow a regular course or secure a degree as to obtain special training in some department of learning. Have we not, in our English love of competition and our tendency to reduce everything to a palpable concrete result, allowed the examination system to grow too powerful, till it has become

the master instead of the servant of teaching and has distracted our attention from the primary duty of a University? It is not any revolutionary change one would desire to see. Such changes are seldom either easy or salutary; while as regards the college system, I find something to regret in those inroads upon the social life and corporate character of the colleges for which the last Commission is responsible. The reform chiefly needed is a reform that would neither injure the Colleges nor affect the character of the University as a seat of general liberal education. Rather let us return to the older conception of a University as a place to which every one who desired instruction might come, knowing that as Oxford took all knowledge for her province she would provide him with whatever instruction he required. The abundance and the cheapness of literature have not diminished, perhaps they have even stimulated, the demand for the best oral teaching, while the recent establishment of so many prosperous colleges in the great towns, the spread of University Extension lectures, the growth of Science schools, have immensely increased the number of young men who would come hither for a year or more to obtain such teaching were they sure of finding it. What is the present position? There are professors, many of whom, eminent as they are, cannot secure proper classes, because the undergraduates are occupied, under the guidance of the college teachers, in preparing for degree examinations. For the teaching of some important branches, especially in natural and in economic science, no adequate staff is provided. England has been outstripped not only by Germany but also by the United States, in the provision of what the Americans call Post-Graduate courses, a provision which even the present poverty of the University need not hinder her from making, were but a reasonable system of fees introduced and revenues husbanded that are now unprofitably spent. Both the new University teachers who might be created and the present professors to whom the existing

system refuses hearers would be only too happy to give those courses, if the students could be found and the requisite arrangements made. The men who would attend the courses are to be found, some of them within, many more without the University. Those without do not come because the courses have not been offered: and to provide for both sets, existing arrangements must be remodelled, for these contemplate only the normal undergraduate who arrives at nineteen, is examined, and departs at twenty-two or twenty-three, and take no account of those who desire neither examinations nor degrees, but simply to perfect themselves in some department of science or learning. Were such courses offered, and were those antiquated arrangements altered, you might soon expect a sensible afflux of students, not from England only, but from far beyond the bounds of England.

Perhaps those who dwell in Oxford have scarcely yet realized the magnificent position this University holds, as not only the oldest and the most externally beautiful and sumptuous place of education in the English-speaking world, but as a spot whose name and fame exert a wonderful power over the imagination of the English peoples beyond the sea, many of whose youth would gladly flock hither were they encouraged to do so by arrangements suited to their needs. For those among the studious youth of the United States and Canada who desire to follow out their special studies, I can safely say from what I have seen of Canada and the United States that did Oxford and Cambridge provide what the Universities of Germany provide, and were it as easy to enter here and choose the subject one seeks to study as it is in the Universities of Germany, it is to Oxford and Cambridge rather than to Germany that most of them would resort: nor could the value be over-estimated of such a tie as their membership here would create between the ancient mother and the scattered children, soon to be stronger than their mother, but still looking to her as the hallowed well-spring of their life.

It is always sad to part from work with which the best years of one's life have been largely occupied: and to me this common regret is deepened by the associations, full of antique dignity, of the office I am resigning and by the nature of the work which has been a source of unfailing pleasure. And my regret at parting is the keener because I part from the place where I have known so many of those brilliant figures whom the last twenty years have taken from us, one of them happily still in the world, though long since lost to the University which his splendid powers adorned,—I mean Mr. Goldwin Smith,—the rest now living only in our recollection. Vividly there come back to me as I stand by the open gate, the kindly wisdom of the late President of Corpus Christi [1], most loveable of men; the luminous and fertile intellect of Sir Henry Maine [2]; the masculine force and high sense of public duty of Thomas Green [3]; the penetration and learning, not more wide than exact, of Mark Pattison [4]; the fine taste and golden lips of Henry Liddon; the warm heart and vehement discourse and noble love of truth of Edward Freeman [5]; the fire, the courage, the eagerness, the zeal in all good causes of one whose university lectures and sermons were so powerful a stimulus to many of us in our undergraduate days, Arthur Stanley [6]. These men had some sharp contests in their lives, but they are all alike enshrined in our memory as men of whom the Oxford of those days may well be proud.

Nor must a word of grateful farewell be omitted to those colleagues in the Faculty of Law—among whom I will venture to reckon the Warden of All Souls—whose thoughts and plans it has been a constant pleasure to share, and with

[1] Dr. John Matthias Wilson, formerly Professor of Moral Philosophy.

[2] Formerly Corpus Professor of Jurisprudence.

[3] Formerly Professor of Moral Philosophy.

[4] Formerly Rector of Lincoln College.

[5] Formerly Regius Professor of Modern History.

[6] Formerly Regius Professor of Ecclesiastical History, afterwards Dean of Westminster.

whom I have lived these many years in a friendship which no cloud of personal disagreement, nor any divergence of political opinions, has ever for a moment darkened. With the regret of parting I carry away the delightful recollection of those years, and a sense which time will not diminish of the honour it has been to be permitted so long to serve this great University, the oldest and most venerated of the dwellings of learning in Britain, dear to us not only because our brightest years were spent among her towers and groves, but still more because in her, as now in maturer life we scan a sometimes troubled horizon to watch for signs of storm, we see an institution which has stood unshaken while dynasties have fallen and constitutions have been changed, and which still and always, placed above the shock of party conflicts and renewing her youth in fresh activities from age to age, embodies in visible and stately form the unbroken continuity of the intellectual life of our country, and still commands, as fully as ever in the past, the loving devotion of her children.

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